

Exhibit R

[FILED UNDER SEAL]

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12 James R. Glidewell Dental Ceramics, Inc.
13 d/b/a Glidewell Laboratories

14 UNITED STATES DISTRICT COURT
15 CENTRAL DISTRICT OF CALIFORNIA
16 SOUTHERN DIVISION

17 JAMES R. GLIDEWELL DENTAL
18 CERAMICS, INC.,

19 Plaintiff,

20 vs.

21 KEATING DENTAL ARTS, INC.,

22 Defendant.

23 AND RELATED
24 COUNTERCLAIMS.

Case No. SACV11-01309-DOC(ANx)

**SUPPLEMENTAL DECLARATION
OF JAMES SHUCK IN SUPPORT OF
JAMES R. GLIDEWELL DENTAL
CERAMICS, INC.'S OPPOSITIONS
TO DEFENDANT'S MOTIONS FOR
SUMMARY JUDGMENT**

Hearing

Date: December 17, 2012
Time: 8:30 a.m.
Cttrm: 9D, Hon. David O. Carter

Pre-Trial Conf.: January 28, 2013
Jury Trial: February 26, 2013

HIGHLY CONFIDENTIAL - FILED UNDER SEAL
(PURSUANT TO PROTECTIVE ORDER DATED JANUARY 30, 2012)

1 I, James Shuck, declare as follows:

2 1. I am Vice President of Sales and Marketing of plaintiff James R.
3 Glidewell Dental Ceramics, Inc. d/b/a Glidewell Laboratories ("Glidewell") and
4 have held this position since 1991. Unless otherwise stated, I have personal and
5 firsthand knowledge of the facts set forth in this declaration, and I could and would
6 testify competently to such facts if called as a witness. This declaration
7 supplements my declaration filed in support of Glidewell's Motions for Partial
8 Summary Judgment.

9 2. Glidewell's total marketing expenses for the BruxZir brand finished
10 crowns and bridges from June 2009 through April 2011 was approximately
11 \$ REDACTED. This figure comprises the following expenses:

- 12 • Direct mail: \$ REDACTED
- 13 • Magazine Ads: \$ REDACTED
- 14 • Fulfillment: \$ REDACTED
- 15 • Eblast/Banner Ads: \$ REDACTED
- 16 • Video: \$ REDACTED
- 17 • Samples: \$ REDACTED

18 3. Glidewell's total sales for BruxZir brand finished crowns and bridges
19 from June 2009 to April 2011 equaled approximately \$ REDACTED. During this
20 time, Glidewell's total sales for BruxZir brand finished crowns and bridges steadily
21 rose.

22 4. From June 2009 to April 2011, Glidewell sold approximately REDACTED
23 dental crowns and bridges under the BruxZir brand.

24 5. BruxZir.com received approximately 94,955 unique pageviews
25 between October 2009 and April 2011. Of this volume, 84.5% was from U.S.
26 traffic.
27
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1 6. During the period from June 2009 to April 2011, Glidewell sold
2 BruxZir brand crown and bridge products to approximately REDACT_{FN} customers in
3 total.

4 7. From June 2009 to April 2011, Glidewell regularly and consistently
5 provided sample BruxZir brand crowns, in association with the Glidewell Labs
6 name, as part of its marketing efforts. These samples were distributed to both
7 current customers and prospective customers, from Glidewell's dentist database
8 available through the American Dental Association. In total, Glidewell handled out
9 REDACT_{FN} samples from June 2009 to April 2011.

10 8. From June 2009 to April 2011, Glidewell consistently sent out e-mail
11 blasts approximately quarterly to U.S. dentists and dental laboratories, advertising
12 Glidewell's BruxZir branded product line, in association with the Glidewell Labs
13 name. These blasts were sent to Glidewell's internal e-mail list and the American
14 Dental Association's e-mail list.

15 9. In promotional and marketing materials relating to the BruxZir brand
16 crown, Glidewell uses the term "BruxZir" to identify its BruxZir brand crown, not
17 the terms "bruxer" or "bruxzir."

18 10. Based upon my person experience in the dental industry and my
19 specific experience monitoring the marketing and advertisements of BruxZir brand
20 crown competitors, it is my estimation that the majority of other dental labs spend
21 no more than \$150,000 per year in advertising costs for Dental Trade Magazine.

22 11. Glidewell first used the BruxZir mark on its website
23 (www.glidewelldental.com) in July 1, 2009. The BruxZir mark has appeared on
24 Glidewell's website since that time.

25 12. Glidewell first used the BruxZir mark on its website www.bruxzir.com
26 in October 15, 2009. The BruxZir mark has appeared on Glidewell's website since
27 that time.

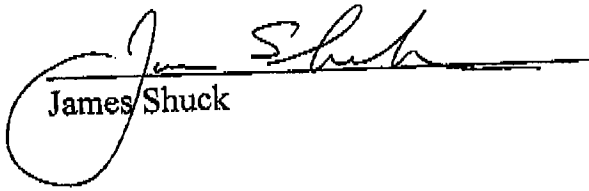
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1 13. Glidewell sends to Authorized BruxZir Labs via e-mail updated
2 Instructions For Use ("IFUs") containing improvements to the manufacturing
3 techniques used by Glidewell to make BruxZir solid zirconia crowns and bridges.
4 These updated IFUs can also be accessed and downloaded online at
5 www.bruxzir.com under the password protected section. These IFUs provide a
6 complete set of instructions for the manufacturing of crowns and bridges using
7 BruxZir-brand zirconia milling blanks, including but not limited to sintering,
8 staining, and cleaning techniques.

9 14. Continental and Trachsel Dental are Glidewell Authorized
10 Laboratories. Both had mistakes in their marketing materials that were corrected
11 after Glidewell became aware of them.

12 15. York Dental Lab is in the process of becoming an Authorized
13 Laboratory. I expect this process to be completed shortly.

1 14. I declare under the penalty of perjury under the laws of the United
2 States of America that the foregoing is true and correct, and that this declaration
3 was executed on November 26, 2012, at NEWPORT BEACH, California.

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6 James Shuck
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Exhibit S

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Attorneys for Plaintiff
7 James R. Glidewell Dental Ceramics, Inc.
d/b/a Glidewell Laboratories
8

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11 SOUTHERN DIVISION

12 JAMES R. GLIDEWELL DENTAL
CERAMICS, INC.,

13 Plaintiff,

14 vs.

15 KEATING DENTAL ARTS, INC.,

16 Defendant.

Case No. SACV11-01309-DOC(ANx)

**SUPPLEMENTAL DECLARATION
OF DR. MICHAEL C. DITOLLA, IN
SUPPORT OF JAMES R.
GLIDEWELL DENTAL CERAMICS,
INC.'S OPPOSITIONS TO
DEFENDANT'S MOTIONS FOR
SUMMARY JUDGMENT**

Hearing

Date: December 17, 2012
Time: 8:30 a.m.
Ctrm: 9D, Hon. David O. Carter

Pre-Trial Conf.: January 28, 2013
Jury Trial: February 26, 2013

17 AND RELATED
18 COUNTERCLAIMS.
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1 I, Dr. Michael C. DiTolla, declare as follows:

2 1. I am the Director of Clinical Education & Research at plaintiff James
3 R. Glidewell Dental Ceramics, Inc. d/b/a Glidewell Laboratories ("Glidewell") and
4 have held this position since 2001. Unless otherwise indicated, I state the following
5 of my own personal knowledge and, if called upon to do so, I could and would
6 testify competently to the following. This declaration supplements my declaration
7 filed in support of Glidewell's Motions for Partial Summary Judgment.

8 2. I interact with approximately two to three thousand dentists a year by
9 phone, e-mail, on various websites, and face to face. Over the past two years,
10 approximately half of my interactions with these dentists have involved inquiries
11 regarding the BruxZir brand crown. Of those dentists inquiring about the BruxZir
12 brand crown, approximately 1/3 of them pronounce the BruxZir mark as "brux-
13 zeer."

14 3. In the DVDs and videos where I refer to a BruxZir brand crown, I'm
15 referring to Glidewell's BruxZir brand crown, not a "bruxer" crown. Indeed, in my
16 24 years as a practicing dentist, I have never used the term "bruxer" to commonly
17 refer to a crown.
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1 I declare under the penalty of perjury under the laws of the United States of
2 America that the foregoing is true and correct.

3 Executed on November 25, 2012 in Newport Beach, California.

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6 Dr. Michael C. DiTolla

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SUPPLEMENTAL DECLARATION OF DR.
MICHAEL DITOLLA
CASE NO. SACV11-01309 DOC (ANX)

- 2 -

EXHIBIT S

-13-

Exhibit T

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14 UNITED STATES DISTRICT COURT
15 CENTRAL DISTRICT OF CALIFORNIA
16 SOUTHERN DIVISION

17 JAMES R. GLIDEWELL DENTAL
18 CERAMICS, INC.,

19 Plaintiff,

20 vs.

21 KEATING DENTAL ARTS, INC.,

22 Defendant.

23 AND RELATED
24 COUNTERCLAIMS.

Case No. SACV11-01309-DOC(ANx)

**SUPPLEMENTAL DECLARATION
OF DAVID FRANKLYN IN
SUPPORT OF JAMES R.
GLIDEWELL DENTAL CERAMICS,
INC.'S OPPOSITIONS TO
DEFENDANT'S MOTIONS FOR
SUMMARY JUDGMENT**

Hearing

Date: December 17, 2012
Time: 8:30 a.m.
Cttrm: 9D, Hon. David O. Carter

Pre-Trial Conf.: January 28, 2013
Jury Trial: February 26, 2013

HIGHLY CONFIDENTIAL - FILED UNDER SEAL
(PURSUANT TO PROTECTIVE ORDER DATED JANUARY 30, 2012)

1 I, David Franklyn, declare as follows:

2 1. I am an expert witness for plaintiff James R. Glidewell Dental
3 Ceramics, Inc. d/b/a Glidewell Laboratories ("Glidewell"). Unless otherwise
4 stated, I have personal and firsthand knowledge of the facts set forth in this
5 declaration, and I could and would testify competently to such facts if called as a
6 witness.

7 2. I reviewed the Declaration of Dr. David W. Eggleston in Support of
8 Keating Dental Arts, Inc.'s ("Keating") Motions for Summary Judgment [Docket
9 No. ("Dkt#") 93] and the Declaration of Lori Boatright in Support of Keating's
10 Motions for Summary Judgment Cancelling Glidewell's Trademark Registration
11 and of Noninfringement of Glidewell's BruxZir Trademark. [Dkt# 94.] Dr.
12 Eggleston attached to his declaration a copy of his: (1) Expert Report, dated
13 September 15, 2012 ("Eggleston Expert Report") [Dkt#93-1], (2) First
14 Supplemental Expert Report dated October 15, 2012 ("Eggleston First
15 Supplemental Expert Report") [Dkt#93-2], and (3) Rebuttal Expert Report dated
16 October 15, 2012 ("Eggleston Rebuttal Expert Report") [Dkt#93-3]. Ms. Boatright
17 attached to her declaration a copy of her Rebuttal Report to the Report of David J.
18 Franklyn dated October 15, 2012 ("Boatright Rebuttal Report") [Dkt#94-1]. I
19 respond to Dr. Eggleston's reports and Ms. Boatright's report below.

20 3. Dr. Eggleston's reports are deficient in several respects. First, BruxZir
21 crowns are not only for people who brux; but rather are used for people who need
22 an aesthetically pleasing and strong crown, regardless of why they might need that
23 type of product. The product serves a wider purpose than restoration of damage
24 caused by bruxism. Dr. Eggleston acknowledged at his deposition that if that is
25 true, his opinion on the genericness of the term "bruxer" for crown may have to be
26 revised.

27 4. Dr. Eggleston's Expert Report fails to show that "bruxer crown" is the
28 generic name for a full zirconia dental crown. Dr. Eggleston lumps together

numerous pieces of “evidence” which, when parsed out, do not support his contention that the “bruxer crown” is the generic name for a full zirconia dental crown. [Dkt#93-1] Altogether, I identified 19 distinct pieces (or categories) of evidence upon which Dr. Eggleston relies, which I have reviewed. [*Id.*] They are listed in the following chart below:

Evid. #	Date	Description	Document	Page
1	7/2008	Article: Association Between Self-Reported Bruxism Activity and Occurrence of Dental Attrition, Abreaction, and Occlusal Puts on Natural Teeth – Journal of Prosthetic Dentistry	Eggleston Expert Report	12
2	1/2007	Thesis, Tolley: The Efficacy of the BiteStrip in Determining Patients Awareness of Nocturnal Bruxism	Eggleston Expert Report	13
3	2/2011	Article, Carden: A Changing Direction in Dentistry: Full-Contour Zirconia	Eggleston Expert Report	13
4	7/2007	Article, Suganuma: The Effect of Bruxism on Periodontal Sensation in the Molar Region: A Pilot Study	Eggleston Expert Report	13
5	1/2007	Article, Schneider: Maladaptive Coping Strategies in Patients with Bruxism Compared to Non-Bruxing Controls	Eggleston Expert Report	13
6	10/2008	Article, Ono: Effect of Sleep Bruxism on Periodontal Sensation and Tooth Displacement in the Molar Region	Eggleston Expert Report	13
7	1/1999	Article, Molina: A Clinical Study of Specific Signs and Symptoms of CMD in Bruxers Classified by the Degree of Severity	Eggleston Expert Report	14
8	10/2009 8/2012	Glidewell YouTube.com videos http://www.youtube.com/u	Eggleston Expert Report	14, 17

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1			ser/glidewell.com		
2	9	N/A	Glidewell.com (Glidewell.com) – “BruxZir: Virtually Bulletproof”	Eggleston Expert Report	15
3	10	N/A	Barth Dental Laboratories	Eggleston Expert Report	15
4	11	N/A	Keller Laboratories – http://kellerlab.com/193/pr oducts/bruxzir.php	Eggleston Expert Report	15
5	12	N/A	Axis Dental Milling – <a href="http://www.axisdentalmilli
ng.com/bruxzir.html">http://www.axisdentalmilli ng.com/bruxzir.html	Eggleston Expert Report	15
6	13	N/A	Crown Dental Studio – <a href="http://crowndentalstudio.c
om/bruxzir.html">http://crowndentalstudio.c om/bruxzir.html	Eggleston Expert Report	15
7	14	N/A	Assured Dental Lab – <a href="http://assuredentallabinc.
com/prep.html">http://assuredentallabinc. com/prep.html	Eggleston Expert Report	16
8	15	N/A	A crown made from zirconia is referred to by dentists and other dental professionals as a bruxer crown	Eggleston Expert Report	16
9	16	2/2011	YouTube, R-Dent: How to Adjust the Bruxir Crown – <a href="http://youtube/sTTwU1LD
vjU">http://youtube/sTTwU1LD vjU	Eggleston Expert Report	16
10	17	10/2009	YouTube, Glidewell: Introduction to BruxZir Total Zirconia – <a href="http://yoube/tUpp_DOY4
Vw">http://yoube/tUpp_DOY4 Vw	Eggleston Expert Report	17
11	18	N/A	Other zirconia products: York Dental Lab (“Bruxer” crown), Barth Dental Lab (“Z-Brux” crown), Mascola Esthetics Dental Lab (“Xtreme Bruxer”), Showcase Dental Lab (“Zir-Bruxer Crown”), R-Dent Laboratory (R-Brux Crown), Infinity Dental Lab (“Bruxer Crown”), Assured Dental Lab (“IPS e.max Bruxer crown”), China Dental Outsourcing (All Zirconia for Bruxers”)	Eggleston Expert Report	17- 18
12	19	N/A	Keating Dental Arts lab orders	Eggleston Expert Report	18

1 5. Items 1-7 are articles that stand for little more than the proposition that
2 “bruxer” is a common word for a person who bruxes --- i.e., who grinds his or her
3 teeth. None of these articles, however, state that there is such a thing as a “bruxer
4 crown.” They, therefore, do not support Dr. Eggleston’s assertion.

5 6. Item 8 is a Glidewell YouTube.com video. Dr. Eggleston apparently
6 is citing this as alleged evidence that Glidewell uses BruxZir and bruxer as phonetic
7 equivalents. However, again, even if this were true, it is not evidence that members
8 of the relevant consuming public use “bruxer crown” as a generic term.

9 7. Items 9-14 are all cites to various dental labs, which according to Dr.
10 Eggleston, support the proposition that Glidewell’s BruxZir crown is primarily
11 intended for people with bruxism. However, that is not the point. That does not
12 prove that dentists or dental labs use the term “bruxer crown” as a generic term.

13 8. Moreover, upon analysis, I was able to determine that both Keller
14 (item 11) and Crown Dental Studio (item 13) are authorized Glidewell labs. They
15 are, therefore, likely referring to Glidewell’s products and not using the term in a
16 generic manner. Similarly, axisdentalmilling.com (item 12) refers to a registered
17 TM - “Bruxzir (R)”- suggesting they are using the Glidewell product. There isn’t
18 any other registered “bruxzir” mark. Item 15 is simply Dr. Eggleston’s own
19 self-pronounced statement that dentists and other dental professionals refer to full
20 zirconia crowns as “bruxer crowns.” However, he does not speak from personal
21 knowledge and states that he, himself, routinely refers to a full zirconia crown as a
22 “bruxer crown.”

23 9. Item 16 is a YouTube video from R-Dent about “How to Adjust the
24 Bruxzir Crown” and does not indicate that the speaker is using the term generically.
25 Indeed, the dentist/speaker states that “some laboratories call it the BruxZir crown;
26 we call it the r-brux crown.” In context, this is not a generic use – especially since
27 R-Dent is an authorized Glidewell lab.
28

10. Item 17 is a YouTube video by Glidewell that Dr. Eggleston appears to cite as an example of Glidewell using BruxZir and bruxer as phonetic equivalents. However, when one looks at the video, the speaker uses BruxZir as a trademark. Again, phonetic equivalence, even if demonstrated, would not make the term “BruxZir” a generic name for a type of crown.

11. Item 18 is a collection of cites to webpages purportedly reflecting uses by several dental labs of the term bruxer in a generic manner. After reviewing these websites, it is clear they do not show that bruxer or BruxZir is a generic name for a type of solid zirconia dental crown:

- York Dental Lab’s website consistently uses BruxZir multiple times with the same spelling and capitalization. The use of BruxZir on York’s website is not a generic use. The product description does use “Bruxer” once to refer to the crown; however this is likely a mistake in light of the previous consistent use.
- The Barth website indicates that zirconium crowns are intended in part for bruxers. It does not use “bruxer crown” as a generic term.
- Mascola’s use of “Xtreme Bruxer” on an Rx form is descriptive use at most and not a generic use.
- Showcase no longer uses the name Zir-Bruxer and now refers to its product as Full Contour Zirconia.
- R-Dent Dental Laboratory is apparently a Glidewell authorized lab which consistently uses BruxZir.
- Infinity Dental Lab appears to be using the term “‘Bruxer’ crowns” in a descriptive rather than a trademark sense. This is consistent with the fact that “Bruxer” is in quotes.
- Assured’s use is ambiguous but may amount to descriptive use.
- China Dental Outsourcing does not currently use the term bruxer crown.

1 12. Item 19 is a collection of approximately 50 Keating Dental Arts
2 written lab orders in which dentists have attempted to order crowns from Keating
3 by writing BruxZir or some close variant thereof. This, in my view, is evidence of
4 actual confusion (i.e., dentists wrongly thinking Keating offers BruxZir products, or
5 thinking that there is some affiliation between Glidewell and Keating), not evidence
6 of generic use of the term BruxZir crown.

7 13. Thus, when it is parsed out, Dr. Eggleston's Expert Report offers very
8 little documentary evidence which even arguably could be taken as examples of
9 relevant professionals using "bruxer crown" in a generic manner. In my view, that
10 is not sufficient to demonstrate that dental professionals generally use the term
11 "bruxer crown" generically.

12 14. Dr. Eggleston's supplemental and rebuttal reports fare no better.
13 [Dkt#93-2, 93-3.] They cite almost exclusively to depositions from this case in an
14 attempt to show that bruxer and BruxZir are phonetic equivalents. [*Id.*] However,
15 that is not the same as showing that BruxZir or Bruxer is widely used as the generic
16 name for a type of dental crown.

17 15. Dr. Eggleston's supplemental and rebuttal reports also misconstrue the
18 evidence. For example, in his Rebuttal Report, Dr. Eggleston makes reference to a
19 forum post from the Dental Lab Network entitled "How to glaze a BruxZir Crown"
20 with date ranges from 10-09-2009 to 6-11-2011. [Dkt#93-3.] Dr. Eggleston claims
21 that "the ongoing discussion is clearly NOT discussing Glidewell's product, but
22 rather is discussing the glazing of zirconia crowns from any source (whether or not
23 from Glidewell)." [*Id.*] What Dr. Eggleston fails to note is that while other
24 products were mentioned within this thread, it is clear that the participants were
25 well aware that BruxZir is a Glidewell product and not a generic term for a zirconia
26 crown indicated for bruxers. Examples would include, but are not limited to, the
27 following posts:

28 "Mark Jackson" of Precision Ceramics Dental Laboratory:

- 1 • 11-22-2010 - "if you want to know how to Glaze a BruxZir restoration,
- 2 simply review your BruxZir training materials "
- 3 • 11-23-2010 - "As for BruxZir (and FDA registered monolithic
- 4 zirconia) simulated wear studies, solubility and other performance
- 5 benchmarks have already been performed."
- 6 • 2nd post from 11-23-2010 - "These doctors are asking about BruxZir
- 7 and being mislead and lied to, and UNKNOWINGLY being switched
- 8 to inferior and inappropriate materials."
- 9 • 3rd post from 11-23-2010 - "There is no SIMILAR product.
- 10 Comparing regular zirconia to BruxZir is like comparing pressable
- 11 porcelain to Lithium Disilicate. . . . All they need to do, is contact
- 12 Glidewell,"
- 13 • 11-23-2010 at 6:10 p.m. "At the moment only BruxZir that I know of.
- 14 All the others use either Lava or Metoxit as their predicate device.
- 15 Crystal zirconia claims to be an EXACT replica of Metoxit and is only
- 16 approved for use as a coping."
- 17 • 11-26-2010 "3M spoke with Glidewell about licensing BruxZir. It
- 18 doesn't fit with their business plan, so they have applied for a
- 19 provisional application for Lava as a full contour material, but even if
- 20 it gets approved, as I'm sure it and others will, it was never designed
- 21 [sic] to be use that way and will not compare to the specialized
- 22 products that WERE.", and many more],
- 23 "Charles007":
- 24 • 10-07-2010 "I also glazed a 3 unit full contour zir bridge . . . This was
- 25 not the Glidewell Bruxzir material";
- 26 • 11-01-2010 "I'm not using Glidewells [sic] bruxzir [sic] or Chrystal
- 27 Diamond..... Top secret full contour zir "
- 28

- 1 • 11-24-2010 "I take a day off DLN and come back to see all hell breaks
- 2 loose over me trying to make full contoured zirconia look better trying
- 3 different stain kits..... ALL of the full contoured zirconia materials I've
- 4 seen look opaque, including BruxZir....."
- 5 • 11-25-2010 "Doug, Glidewell has spent mega \$\$ on BruxZir, don't
- 6 think any lab using this product will be a tester, I would call it a Mega
- 7 money maker materialOther companies with try to "one up it"
- 8 , which will eventually benefit us all in the long run. Who knows what
- 9 the next full contoured material will be and when it will come out.....
- 10 I keep hearing about new materials, and I definitely don't want to be a
- 11 tester."

12 "TheLabGuy"

- 13 • 11-22-2010 "If it's any consolation.....I don't sell any full contour
- 14 zirconia or bruxzir";
- 15 • 11-23-2010 "Most of us are all still riding the E.max tsunami and full
- 16 contour zirconia or BruxZir is still in it's infantile stages and why
- 17 everyone here is asking so many questions about it.";
- 18 • 2nd post from 11-23-2010 "Now, as John mentioned, if you would like
- 19 to explain the differences in BruxZir and Zirconia and why it's a better
- 20 product (preferably not because the FDA says so)";
- 21 • 3rd post from 11-23-2010 "A question: Do most of the manufacturers
- 22 out there have a FDA registered (501) full contour zirconia restoration
- 23 available on the market? Or is BruxZir the only one (even though its
- 24 composition is different)."

25 "JohnWilson, " the moderator:

- 26 • 11-22-2010 "As for counterfeiting I know you are one of the few that
- 27 actually has the glidewell [sic] product at PCDL, and you have a
- 28 vested interest in maintaining the brand name. With that being said it is

1 a mistake and illegal to use the name Bruxzi [sic] to refer to any other
2 product other than a Bruxzi [sic].”;

- 3 • 11-23-2010 “As for the fact that we are in the infancy of Monolithic ZI
4 restorations, the brand people have heard of is of course because of
5 Glidewells amazing marketing budget.”;
- 6 • 2nd post from 11-23-2010 “Since it’s obvious that I do not know the
7 difference between a BruxZir crown and a generic Full contour Zir
8 crown perhaps you can share the difference with us all. Not just the
9 fact that there is a 510k registration on the specific product. Oh and
10 BTW what other labs have bought into the BRUXzir system from
11 glidewell?”

12 “DMC” aka “C.D.T Crazy Dental Tech”:

- 13 • 11-23-2010 “I’ll make full Zirconia all day long and not lose any sleep
14 over it. . . . How does it get any cheaper than the home-made Zirconia
15 from Glidewell?LOL What if I get a prescription with the word
16 Bruxzir mis-spelled?”;
- 17 • 2nd post from 11-23-2010 “I can tell you that we have made 100%
18 Zirconia crowns for over 100 Labs! I do it everyday. They all knew it
19 was not a Glidewell product. Good luck trying to sue all of us.”
- 20 • 3rd post from 11-23-2010 at 5:32 p.m. “I have only the best of the best
21 in my lab. I would NEVER sell that chit Zirconia from Glidwell[sic]!”

22 16. Moreover, much of the “evidence” on which Dr. Eggleston relies is
23 legally not germane to the genericness issue in this case. In this case, to prevail on
24 its genericness counterclaim, the defendant Keating must prove that BruxZir was
25 the generic name for full zirconia dental crowns by September, 2010 or May, 2011
26 at the latest– the dates that Keating entered the market in competition with
27 Glidewell. It is well established in the Ninth Circuit that the date for determining
28

1 genericness in an infringement action is the date when the alleged infringer entered
2 the relevant market.¹

3 17. Here, it is my understanding that Keating entered the dental crown
4 market – using the KDZ Bruxer mark – in either September 2010 when it began
5 selling zirconia crowns under the KDZ Bruxer name to existing customers, but no
6 later than May, 2011 when it publicly advertised zirconia crowns under that name.
7 Yet, in supporting both his “phonetic equivalence” and “genericness” opinions, Dr.
8 Eggleston relies almost entirely on excerpts from journals, articles, videos and the
9 internet which either occurred after May, 2011 or which are not dated. [Dkt#93-1]

10 18. To the extent that Dr. Eggleston relies on evidence before Keating
11 entered the market, it is not evidence of generic use of the term “bruxer” as a type
12 of zirconia crown. Indeed, in Dr. Eggleston’s Expert Report, the only evidence he
13 cites before September 2010 are articles (items 1-7 in the chart above) that show
14 that “bruxer” is a word for a person who grinds. [Dkt#93-1.] In his Expert
15 Rebuttal Report, Dr. Eggleston cites a blog (photodontist.blogspot.com) to support
16 the assertion that BruxZir crown is used generically. [Dkt#93-3.] Yet, Dr.
17 Eggleston’s own description of the blog – and a plain reading of the blog itself –
18 amply demonstrate that the author (a Mr. Vu Le) is using the BruxZir name as a
19 trademark. Indeed, Mr. Le mentions Glidewell Labs specifically! In a follow up to
20 his blog entry, Dr. Le explicitly indicates his knowledge that “[g]lidewell Labs
21 markets them under the brand name Bruxzir”²

22 19. Dr. Eggleston has not offered any credible evidence that BruxZir – or
23 its alleged phonetic equivalent “bruxer” – was predominantly seen as the generic
24

25 ¹ *Yellow Cab Co. of Sacramento v. Yellow Cab of Elk Grove, Inc.*, 419 F.3d 925,
26 928 (9th Cir. 2005) (“The crucial date for the determination of genericness is the
27 date on which the alleged infringer entered the market with the disputed mark or
28 term.”). *See also Nora Beverages, Inc. v. Perrier Group of Am., Inc.*, 164 F.3d 736,
744 (2d Cir. 1998).

² <http://photodontist.blogspot.com/2009/10/bruxzir-vs-pfm-round-2-full-zirconia-vs.html>.

1 name for full zirconia crowns as of September 2010 or even by May, 2011. Nor
2 has he shown that to be the case today.

3 20. Incidental generic uses do not render a mark generic. *See* McCarthy on
4 Trademarks and Unfair Competition § 12:6 (4th Ed.) (stating that a term must be
5 predominantly seen as generic before it will be considered legally generic and
6 suggesting as a bench mark that at least 75% of the relevant consuming public view
7 of the mark primarily as the generic name for that type of product and not primarily
8 as a brand name.); *see also* 15 U.S.C.A § 1064(3); McCarthy on Trademarks and
9 Unfair Competition § 12:8 (4th ed.) citing *Coca-Cola Co. v. Overland, Inc.*, 692
10 F.2d 1250 (9th Cir. 1982) (COKE not a generic name).

11 21. The evidence cited by Dr. Eggleston demonstrates that BruxZir and/or
12 Bruxer have not been understood by dentists or dental labs to be generic but rather
13 to refer to Glidewell's products. *See, e.g.*, posts by "Mark Jackson" of Precision
14 Ceramics Dental Laboratory [11-22-2010; 11-23-2010; 2nd post from 11-23-2010;
15 3rd post from 11-23-2010; 4th post from 11-23-2010; 11-26-2010]; "Charles007"
16 [10-7-2010; 11-01-2010; 11-24-2010; 11-25-2010]; "TheLabGuy" [11-22-2010;
17 2nd post from 11-22-2010; 11-23-2010; 2nd post from 11-23-2010; 3rd post from
18 11-23-2010]; "JohnWilson"[11-22-2010; 11-23-2010; 2nd post from 11-23-2010;
19 11-23-2010 at 6:18 p.m.]; "Al." [11-24-2010] and "DMC" aka "C.D.T Crazy Dental
20 Tech" [11-23-2010; 2nd post from 11-23-2010; 3rd post from 11-23-2010 at 5:32
21 p.m.; 11-29-2010].

22 22. Dr. Eggleston does not cite sufficient evidence to support an opinion
23 that as of September, 2010 or May, 2011, a majority of dentists or dental labs used
24 the terms "BruxZir crowns" or "bruxer crown" as a generic name for full zirconia
25 crowns.

26 23. Paragraphs 54-68 of my declaration submitted in support of
27 Glidewell's Motions for Summary Judgment also support my opinion that Dr.
28

1 Eggleston's opinions in the expert reports attached to his declaration are unfounded.
2 [Dkt#90-1].

3 24. In Ms. Boatright's Rebuttal Report [Dkt#94-1], she argues that:

- 4 • (a) BruxZir should have been denied registration by the United States
5 Patent and Trademark Office ("PTO") – when such registration was
6 issued on January 19, 2010, on the grounds that BruxZir is either
7 generic and/or highly descriptive as a mark for full zirconia dental
8 crowns;³
- 9 • (b) Because it should not have been registered, Glidewell's BruxZir
10 mark should be given no protection in this case;⁴
- 11 • (c) Glidewell's BruxZir mark is weak;⁵
- 12 • (d) Glidewell has presented no evidence of secondary meaning in its
13 mark;⁶
- 14 • (e) In her opinion, there is no evidence that relevant consumers would
15 confusingly associate Keating's KDZ Bruxer mark with Glidewell's
16 BruxZir mark, even though both companies are in the same market and
17 sell to similar customers;⁷ and
- 18 • (f) Keating is using "Bruxer" in its descriptive sense and not as a
19 mark.⁸

20 25. Ms. Boatright is wrong in all of these respects.

21 26. First, she is wrong that Glidewell's BruxZir mark should not have
22 been registered. Ms. Boatright has presented no evidence to support her position

23 ³ Boatright's Rebuttal Report, p. 20.

24 ⁴ *Id.*

25 ⁵ *Id.* at 22.

26 ⁶ *Id.* at 24.

27 ⁷ *Id.* at 20

28 ⁸ *Id.*

1 that when Glidewell's mark was registered in January of 2009, it was
2 predominantly seen by (at least 75%) of dentists or dental labs as "the" (or even
3 "a") generic name for full zirconia dental crowns. Like Dr. Eggleston, she lumps
4 together citations to various pieces of evidence with no regard to their date. Nor, as
5 she well knows, is occasional or anecdotal generic use sufficient to deny
6 registration to a mark.⁹

7 27. When carefully analyzed, it is clear she provides no evidence that
8 BruxZir or Bruxer is a generic name for a full zirconia crown. None of the
9 documents she cites uses BruxZir or bruxer as the generic name for a solid zirconia
10 crown. Rather, her alleged evidence stands at most for the proposition that a bruxer
11 is a person who suffers from bruxism and that one indicated use of the BruxZir
12 solid zirconium crown is as a restoration for people who have suffered from
13 bruxism.

14 28. Second, Ms. Boatright does not state that in her opinion BruxZir was
15 (or even today is) the generic name for full contour Zirconia crowns. Rather, she
16 says it should not have been registered because it is *either generic or highly*
17 *descriptive*.¹⁰ Only generic terms are per se unregistrable and unprotectable.¹¹

18 ⁹ 2 McCarthy on Trademarks § 12:12 (4th ed. 2012) ("Because a finding of
19 genericness may result in the loss of rights which could be valuable intellectual
20 property, a court should not find genericness without persuasive and clear evidence
21 that the contested term has become generic among a majority of the buyer group.").
22 *Ty, Inc. v. Softbelly's, Inc.*, 353 F.3d 528, 531 (7th Cir. 2003) ("To determine that a
23 trademark is generic and thus pitch it into the public domain is a fateful step. . . .
24 The fateful step ordinarily is not taken until the trademark has gone so far toward
25 becoming the exclusive descriptor of the product that sellers of competing brands
26 cannot compete effectively without using the name to designate the product they
27 are selling").

28 ¹⁰ Boatright's Rebuttal Report, p. 21.

¹¹ 2 McCarthy on Trademarks § 12:1 (4th ed. 2012) ("... a generic name of a
product can never function as a trademark to indicate origin."). *See also*
Restatement (Third) of Unfair Competition § 15 cmt. a (1995) ("Generic

1 “Highly” descriptive terms can be – and have been – registered as trademarks, so
2 long as they have “secondary meaning,” i.e., they have come to be seen as the brand
3 name of a company or product.¹² Thus, her opinion that BruxZir may be
4 categorized as “descriptive” or even “highly descriptive” is not alone grounds to
5 refuse it registration or protection as a mark.

6 29. Ms. Boatright focuses on registration as the issue. But protection is
7 the issue here, not registration. Glidewell’s mark is a registered mark.¹³ Therefore,
8 Glidewell is entitled to a presumption of validity of the mark.¹⁴ This is an
9 infringement action – not an appeal from a TTAB ruling on Glidewell’s mark. In
10 an infringement action in the Ninth Circuit, the law is clear that the defendant
11 asserting that plaintiff’s mark is generic must prove it was predominantly seen by
12 relevant consumers as the generic name for the type of product at issue when the
13 alleged infringer entered the market.¹⁵

14
15
16 designations are not subject to appropriation as trademarks at common law and are
17 ineligible for registration under federal and state trademark registration statutes.”).
18 *See also Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)
19 (“Generic terms are not registrable, and a registered mark may be canceled at any
20 time on the grounds that it has become generic.”).

21 ¹² 2 McCarthy on Trademarks § 15:8 (4th ed. 2012) *citing Echo Travel, Inc. v.*
22 *Travel Associates, Inc.*, 870 F.2d 1264, 1268 (7th Cir. 1989) (“The establishment of
23 secondary meaning is what removes the mark from the public domain as an
24 indicator of origin for certain goods or services.”).

25 ¹³ BRUXZIR, Registration No. 3,739,663.

26 ¹⁴ 15 U.S.C. § 1115(a) (2012) (“Any registration issued . . . shall be prima facie
27 evidence of the validity of the registered mark . . .”). *See also Reno Air Racing*
28 *Ass’n, Inc. v. McCord*, 452 F.3d 1126, 1135 (9th Cir. 2006) *citing Yellow Cab Co.*
of Sacramento v. Yellow Cab of Elk Grove, Inc., 419 F.3d 925, 928 (9th Cir. 2005)
 (“ . . . [R]egistered marks are endowed with a strong presumption of validity”).

¹⁵ *Yellow Cab Co. of Sacramento v. Yellow Cab of Elk Grove, Inc.*, 419 F.3d 925,
928 (9th Cir. 2005) (“The crucial date for the determination of genericness is the
date on which the alleged infringer entered the market with the disputed mark or
term.”). *See also Nora Beverages, Inc. v. Perrier Group of Am., Inc.*, 164 F.3d 736,
744 (2d Cir. 1998).

1 30. Ms. Boatright does not cite the *Yellow Cab* case or mention its key
2 ruling – i.e., that the time for determining genericness in an infringement action is
3 when the alleged infringer (here Keating) entered the market. This is important
4 because even if the PTO should have denied registration to BruxZir on the ground
5 that it was then “highly descriptive” (a point with which I disagree), that would say
6 nothing about the validity of Glidewell’s common law rights in its mark today, in
7 May, 2011, or in September, 2010. This is because while descriptiveness may be
8 relevant to registration, it is not sufficient to deny common law rights in a mark.
9 Only truly generic marks are legally unprotectable. Descriptive marks are
10 protectable as long as they have secondary meaning.¹⁶

11 31. Ms. Boatright is also wrong when she asserts that Glidewell has no
12 evidence to establish that dentists and dental labs see BruxZir as Glidewell’s mark
13 and do not see it as a term that merely describes some of their patients. By the time
14 Keating entered the market in either September, 2010 or May, 2011, Glidewell had
15 already sold thousands of full zirconia crowns under the BruxZir brand name. It
16 had also engaged in extensive advertising of its mark and gained industry acclaim
17 for the BruxZir brand crown. Based on my review of the evidence cited in support
18 of Glidewell’s Motions for Summary Judgment, I learned that Glidewell promotes
19 its dental crowns and bridges under the BruxZir mark through the Internet (through
20 Glidewell’s blog as well as www.BruxZir.com), direct mailers, trade shows, ads in
21 dental industry publications, press releases, continuing education brochures, videos
22 and training sessions for dentists, samples, and specialized prescription forms.¹⁷
23 Over the period June 2009 to June 2012, Glidewell spent approximately REDACTED

24
25 ¹⁶ See footnote 11.

26 ¹⁷ See Dkt#90-1 (Shuck Decl., Ex. G, ¶¶ 20-26); Dkt#90-1 (Newman Decl., Ex. B,
27 ¶ 3); Dkt#90-1 (Michiels Decl., Ex. Q, ¶ 3); Dkt#90-1 (Luke Decl., Ex. D, ¶ 3);
28 Dkt#90-1 (Doneff Decl., Ex. A, ¶ 3); Dkt#90-1 (Bell Decl., Ex. E, ¶ 3); Dkt#90-1
(Cohen Decl., Ex. C, ¶ 3); Dkt#90-1 (Toca Decl., Ex. F, ¶ 3); Dkt#90-1 (Goldstein
Decl., Ex. O, ¶ 19); Dkt#90-1 (DiTolla Decl., Ex. I, ¶¶ 4, 6-7, 10).

1 in promoting its BruxZir finished crowns and bridges through these channels.¹⁸
2 Glidewell's BruxZir branded line of dental restoration products has received wide
3 recognition and acclaim in the dental industry, including (1) the 2010 Best Product
4 Innovation Award from Tosch Corporation, (2) the Journal of Dental Technology's
5 Wow! 2011 Products Awards, (3) Inside Dental Technology 2011 iNavigator Top
6 Pick, (4) 2011 Best Product from Clinician's Report, (4) the Pride Institute's 2012
7 Best of Class Technology Award, and (5) 2012 semifinal candidate for Best New
8 Material.¹⁹ Furthermore, the dentists with whom I spoke (which are identified in
9 my declaration submitted in support of Glidewell's Motions for Summary
10 Judgment) uniformly stated that BruxZir quickly established itself as a widely
11 recognized brand for solid zirconium crowns and that BruxZir is widely recognized
12 as identifying Glidewell Laboratories as the source of such products. [Dkt#90-1]

13 32. Thus, it is disingenuous for Ms. Boatright to say that the BruxZir mark
14 had become famous enough to be generic for full zirconia crowns but not famous
15 enough to have secondary meaning in that market.

16 33. Ms. Boatright is also wrong when she says that BruxZir is a weak
17 mark. It is not. It is a strong mark in the market(s) in which it is used. It is both
18 linguistically strong and strong from a market penetration perspective. Aside from
19 Glidewell and Keating, no one else uses "bruxer" as a trademark for full zirconia
20 dental crowns. And Glidewell was indisputably first to use and first to register.
21 Moreover, dentists widely see Glidewell as the market leader in the field of solid
22 zirconium crowns.

23 34. Ms. Boatright is also wrong when she says that there is no evidence
24 that consumers (dentists and dental labs) are confused between BruxZir crowns and
25 KDZ Bruxer crowns. Ms. Boatright does not cite or discuss (and perhaps was not

26 ¹⁸ Dkt #90-1 (Shuck Decl., Ex. G, ¶¶ 38, 39); Dkt. #90-1 (Goldstein Decl., Ex.), ¶
27 16).

28 ¹⁹ Dkt#90-1 (Shuck Decl., Ex. G, ¶¶ 32-36); Dkt. #90-1 (Goldstein Decl., Ex. O, ¶
20).

1 shown) the more than 50 orders placed by Keating's customers (dentists) seeking to
2 order Glidewell's BruxZir crowns from Keating. In addition, Ms. Boatright was
3 not shown the declaration of Nicole Fallon in support of Glidewell's Motions for
4 Summary Judgment and the exhibits referenced therein, which showed actual
5 confusion by Dr. Le between Glidewell's BruxZir crown and Keating's KDZ
6 Bruxer crown. [Dkt#90-1]. Even if she wishes to somehow dismiss or weaken this
7 evidence, she cannot in good faith say there is no such evidence. The risk of
8 consumer confusion is not only high here – it has materialized. Furthermore,
9 several dentists with whom I spoke stated that if they saw a solid zirconium crown
10 advertised for sale under the name "KDZ Bruxer," they would likely be confused as
11 to the source of such products or the zirconium material from which they were
12 made.

13 35. Paragraphs 54-68 of my declaration submitted in support of
14 Glidewell's Motions for Summary Judgment also support my opinion that Ms.
15 Boatright's opinions in her expert reports are unfounded. [Dkt#90-1].

16 36. Ms. Boatright is wrong when she says Keating is using the word
17 Bruxer as a descriptive word only and not as a trademark. She seems to rely on the
18 fact that Keating "disclaimed" an interest in the word "bruxer" standing alone when
19 it applied to the USPTO for rights in the mark "KDZ Bruxer."²⁰ However, a
20 disclaimer in a trademark application does not mean that the word is somehow
21 excised from the mark for which protection will eventually be sought.²¹ Nor does it
22 mean the use of the word as part of one's brand name in branding materials is
23 somehow negated and rendered only a descriptive use.

24
25 ²⁰ Boatright's Rebuttal Report, p. 20.

26 ²¹ 2 McCarthy on Trademarks § 11:52 (4th ed. 2012) ("A disclaimer of descriptive
27 matter in a registered composite mark does not deprive the registrant of any
28 common law rights registrant may have in the disclaimed matter.") *See also* 15
U.S.C. § 1056(b) (2012) ("No disclaimer . . . shall prejudice or affect the applicant's
or registrant's rights then existing or thereafter arising in the disclaimed matter.").

1 37. Contrary to Ms. Boatright's contention, Keating is clearly using
2 "Bruxer" as part of its brand name. Indeed, Keating alleges in its amended answer
3 and counterclaims that KDZ Bruxer is a trademark.²² Keating capitalizes "Bruxer";
4 includes it as a component of its mark; and uses it as a mark on its website and in
5 its other marketing materials. It therefore is not exempt from liability under the
6 descriptive fair use doctrine.²³ If Keating wants to take advantage of the descriptive
7 fair use doctrine it should limit its use of the word "bruxer" to truly descriptive uses
8 – i.e., to uses which refer to people who brux – and not as the trademark of its
9 competing zirconia crown products.

10 38. Finally, on the issue of good faith, Ms. Boatright disagrees with my
11 opinion that Keating is trading on the good will of Glidewell. However, that
12 opinion is based on the fact that there is actual confusion in this case – Keating is
13 receiving orders from people who are trying to order Glidewell BruxZir products.
14 Keating is not an authorized BruxZir dental lab selling crowns made from
15 Glidewell's BruxZir raw materials – but some dentists apparently think it is. That
16 is exactly the type of free-riding on good will that United States trademark law is
17 designed to remedy.

18 39. I have reviewed Keating's Statement Of Uncontroverted Facts And
19 Conclusions of Law In Support of Motion For Summary Judgment of
20 Noninfringement of Glidewell's Bruxzir® Trademark, Keating's Exhibits 24, 27-

21 ²² Second Amended Answer, Affirmative Defenses and Counterclaims, Doc. No.
22 57-1 ("SAA") ¶ 13 ("Defendant admits that it has used in commerce the term KDZ
23 BRUXER as a trademark in connection with advertising of, sale of, or offer to sell
dental prostheses."); ¶ 41 (application for registration).

24 ²³ Restatement (Third) of Unfair Competition § 28 cmt. c (1995) ("Fair use is a
25 reasonable and good faith use of a descriptive term that is another's trademark to
26 describe rather than to identify the user's goods, services, or business."). *See also* 2
27 McCarthy on Trademarks § 11:46 (4th ed. 2012) Often, an infringing trademark
28 usage of the challenged term is evidenced by its employment as an
'attention-getting symbol.'). *See also Sands, Taylor & Wood Co. v. Quaker Oats*
Co., 978 F.2d 947, 954 (7th Cir. 1992) (defendant used plaintiff's THIRST AID
mark not in a sentence describing defendant's GATORADE sports drink, but as an
attention-getting symbol in advertising; this is evidence of trademark use which
disqualifies defendant from the fair use defense).

29, 31, 34, 37, 39, 42, 43, 93, 94, 96, 99-103, 105, 106, 108-114, 119-137, as well as the declaration of Carol Frattura and the attached Exhibit A. After reviewing these documents, it is my opinion that Keating's cited evidence fails to demonstrate a crowded field. Keating's examples of companies that offer "dental products for use with bruxers" or "associated with zirconia" are made up of 40 companies and dentists offering 43 products under names that fit the criteria that Keating determined was relevant. For this evidence to be relevant to the crowding issue, the "crowding" marks would have to be confusingly similar to Glidewell's BruxZir mark. However, of all of the cited uses identified in Keating's SUF 50, none includes any combination of "Brux" and either "Zir" or "Z," and only one ("BruxArt") involves a product that competes with those covered by Glidewell's BruxZir registration. These uses are therefore entirely irrelevant to an evaluation of the strength of the BruxZir mark.

40. In its SUF 51, Keating recites a list of dental laboratories that, according to Keating, sell "all-zirconia crowns under a variety of names" that include the fragments "Brux" or "Zir" or "z." Eleven of these contain only a "Zir" or "Z" fragment without any "Brux" component, or a "Brux" element with a distinguishing suffix (e.g., "BruxThetix"), and are therefore phonetically dissimilar. It is my understanding several labs, including "Z-Brux" (Assured Dental Lab), "Brux" (Authentic Dental), "Bruxer All Zirconia" (China Dental Outsourcing), "Full Solid Bruxer Zirconia" (Fusion Dental Lab), and "Bruxer Crown" (Pittman Dental), were discontinued after the dental labs received cease and desist letters from Glidewell's General Counsel. In addition, it is my understanding that at least two labs, "Full Zirconia for Bruxing Patients" (Continental Dental) and "All Zirconia Bruxer" (Trachsel Dental), were authorized labs that simply made a mistake in their marketing materials that Glidewell caught and corrected. Other, such as "All Zirconia for Bruxers" appear not to reflect a trademark usage at all but

1 rather a description of particular goods. These uses therefore do not constitute
2 “crowding” uses.

3 41. The only arguably relevant uses include “Z-Brux” (Barth Dental
4 Labs), “Bruxer Crown” (Cosmetic Dentistry of SA), “Full Zirconia (Bruxer)” (Dani
5 Dental), “GPS BruxArt” (GPS Dental Lab), “Bruxer Crowns” (Infinity Dental
6 Lab), and “Xtreme Bruxer” (Mascola Esthetics). However, Cosmetic Dentistry of
7 SA appears to be a dental office rather than a dental laboratory, and advertises to
8 patients rather than to dentists. Its “use” is therefore not in the relevant market.
9 Infinity Dental Lab appears to be using the term “‘Bruxer’ crowns” in a descriptive
10 rather than a trademark sense. Dani Dental’s use of the term “Full Zirconia
11 (Bruxer)” consists of a prescription form that includes a box next to the term “Full
12 Zirconia (Bruxer).” This evidence does not demonstrate how Dani Dental markets
13 its good and it appears that this entry is used descriptively to refer to a full zirconia
14 crown that could be used for a patient with bruxism rather than in a trademark
15 sense. Keating’s evidence concerning Mascola’s use of the term “Xtreme Bruxer”
16 also consists of a preprinted prescription form that says little concerning whether or
17 how Mascola markets any goods to dentists.

18 42. After this analysis, it appears that Keating is left with two purported
19 uses that appear to be trademark uses in commerce directed to the relevant market:
20 “Z-Brux” by Barth Dental Labs, and “GPS BruxArt” by GPS Dental Lab. Two
21 uses in the relevant market, unsupported by any evidence of advertising, sales or
22 actual impairment of the commercial strength of the BruxZir mark, is insufficient to
23 meet the showing required to justify summary judgment on the basis of a “crowded
24 market.”

25 43. On November 26, 2012, I visited the web page located at:
26 <http://assureddentallab.com/ProductsandPricing.htm>. Attached as Exhibit 89 is a
27 true and correct copy of Assured Dental Lab’s website, as of 11/26/2012. This
28 website does not list a “Z-Brux” product.

1 44. On November 26, 2012, I visited the web page located at:
2 http://authenticlab.com/restorative_options.htm. Attached as Exhibit 90 is a true
3 and correct copy of Authentic Dental Lab's website, as of 11/26/12. This website
4 does not list a "Brux" product.

5 45. On November 26, 2012, I visited the web page located at:
6 <http://www.chinadentaloutsourcing.com/p-ceramic-bruxer.html>. Attached as
7 Exhibit 91 is a true and correct copy of China Dental Outsourcing's website, as of
8 11/26/12. This website does not list a "Bruxer All Zirconia" product.

9 46. On November 26, 2012, I visited the web page located at:
10 <http://www.continentaldental.com/products/cadcam-a-non-metallics>. Attached is
11 Exhibit 92 is a true and correct copy of Continental Dental's website, as of
12 11/26/12. This website does not list a "Full Zirconia for Bruxing Patients" product.

13 47. On November 26, 2012, I visited the web page located at:
14 <http://www.pittmandental.com/products/Zirconia.html>. Attached as Exhibit 93 is a
15 true and correct copy of Pittman Dental's website, as of 11/26/12. This website
16 does not list a "Bruxer Crown" product.


17 48. On November 26, 2012, I visited the web page located at:
18 <http://www.somer.com/products/full-contour-zirconia-crowns/>. Attached as
19 Exhibit 94 is a true and correct copy of Somer Dental Labs' website, as of 11/26/12.
20 This website does not list a "Full Contour Zir" product.

21 49. On November 26, 2012, I visited the web page located at:
22 <http://www.trachseldentalstudio.com>. Attached as Exhibit 95 is a true and correct
23 copy of Trchsel Dental's website, as of 11/26/12. This website does not list an
24 "All Zirconia Bruxer" product.

25 50. On November 26, 2012, I visited the web page located at:
26 <http://www.yorkdentallab.com/products>. Attached as Exhibit 96 is a true and
27 correct copy of York Dental Lab's website, as of 11/26/12. This website does not
28 list a "Bruxer" product.

1 51. On November 26, 2012, I visited the web page located at:
2 <http://www.showcasedental.com/about/products.html>. Attached as Exhibit 97 is a
3 true and correct copy of Showcase Dental's website, that I reviewed on 11/26/12.
4 This website does not list a "Zir-Bruxer" product.
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1 I declare under the penalty of perjury under the laws of the United States of
2 America that the foregoing is true and correct, and that this declaration was
3 executed on November 26th, 2012, at San Francisco, California.

4
5 
6 David Franklyn
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Snell & Wilmer

LLP

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Exhibit U

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7 Attorneys for Plaintiff
James R. Glidewell Dental Ceramics, Inc.
8 d/b/a Glidewell Laboratories

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11 SOUTHERN DIVISION

12 JAMES R. GLIDEWELL DENTAL
13 CERAMICS, INC.,

14 Plaintiff,

15 vs.

16 KEATING DENTAL ARTS, INC.,

17 Defendant.

Case No. SACV11-01309-DOC(ANx)

**SUPPLEMENTAL DECLARATION
OF ROBIN CARDEN IN SUPPORT
OF JAMES R. GLIDEWELL
DENTAL CERAMICS, INC.'S
OPPOSITIONS TO DEFENDANT'S
MOTIONS FOR SUMMARY
JUDGMENT**

Hearing

Date: December 17, 2012
Time: 8:30 a.m.
Ctrm: 9D, Hon. David O. Carter

Pre-Trial Conf.: January 28, 2013
Jury Trial: February 26, 2013

18
19 AND RELATED
20 COUNTERCLAIMS.
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1 I, Robin Carden, declare as follows:

2 1. I am Vice President of Research and Development, of plaintiff James
3 R. Glidewell Dental Ceramics, Inc. d/b/a Glidewell Laboratories ("Glidewell") and
4 have held this position since December 2011. I have personal knowledge of the
5 statements contained in this declaration.

6 2. I began working with Glidewell as a consultant in 2005. I was hired to
7 look at exploring partially stabilized zirconia as a material for dental products. I
8 was familiar with partially stabilized zirconia because of previous experience with
9 zirconia ferrules, or connecting devices, for fiber optics. Thus, beginning in 2005,
10 I began developing for Glidewell a new type of crown, a solid zirconia crown. In
11 December 2009, I became a full time employee and was named Senior Director of
12 Research and Development. In December 2011, I was promoted to my current
13 position of Vice President of Research and Development.

14 3. To become an authorized dental lab for making BruxZir solid zirconia
15 crowns and bridges ("Authorized BruxZir Lab"), dental labs must first possess the
16 correct equipment to mill and sinter the BruxZir Zirconia. Glidewell's R&D
17 department will implement a certification process which includes an extensive
18 validation process to ensure that the personnel of such dental labs are properly
19 trained and equipped to make BruxZir solid zirconia crowns and bridges that are of
20 the same quality as those made by Glidewell, using the BruxZir-brand zirconia
21 milling blanks sold by Glidewell.

22 4. In the first step of this validation process, Glidewell sends to a dental
23 lab (i) test specimen made from BruxZir-brand zirconia milling blanks sold by
24 Glidewell, and (ii) Glidewell instructions for use ("IFUs") for making BruxZir solid
25 zirconia crowns and bridges. The dental lab sinters the test specimen in accordance
26 with these IFUs. The dental lab then sends back to Glidewell the sintered test
27 specimen. Glidewell then tests the sintered test specimen to ensure that the
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1 physical material characteristics are consistent with BruxZir solid zirconia crowns
2 and bridges made by Glidewell. If the sintered test specimen is acceptable, then
3 Glidewell notifies the dental lab that it's processes duplicate the properties that
4 Glidewell has established with the BruxZir Zirconia material..

5 5. If a dental lab does not pass the validation process in its first attempt,
6 Glidewell follows up with the dental lab to remedy any technical issues, in order to
7 assist the dental lab to achieve an acceptably high level of quality in terms of the
8 output of its manufacturing process. Typically, with Glidewell's guidance and
9 training, dental labs are able to improve their manufacturing techniques so to be in
10 accordance with Glidewell's IFUs, and become certified.

11 6. To become an Authorized BruxZir Lab, a dental lab must also pass a
12 three-month probation period, during which the dental lab shows a consistent
13 purchase of BruxZir milling blanks and coloring kits over three months. A pattern
14 of consistent orders provides Glidewell with assurance that the dental lab is using
15 BruxZir materials to make BruxZir solid zirconia crowns and bridges. In particular,
16 the purchase of the BruxZir-brand zirconia milling blanks and the coloring kits are
17 particularly important because these two inputs largely ensure that the end-product
18 crown or bridge will have the strength, hardness and esthetic quality that sets the
19 BruxZir-brand solid zirconia crowns and bridges apart from the competition.

20 7. In every BruxZir milling blank order sent to Authorized BruxZir Labs,
21 Glidewell's then-current IFUs for preparing the BruxZir solid zirconia crowns and
22 bridges are provided. These IFUs are the same instructions used by Glidewell to
23 make BruxZir solid zirconia crowns and bridges. They provide a complete set of
24 instructions for the manufacturing of crowns and bridges using BruxZir-brand
25 zirconia milling blanks, including but not limited to sintering, glazing, and staining
26 techniques. Videos detailing every step of the manufacturing of crowns and bridges
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1 using BruxZir-brand zirconia milling blanks are available to the Authorized
2 BruxZir Labs online at www.bruxzir.com under the password protected section.

3 8. Glidewell sends to Authorized BruxZir Labs via e-mail updated IFUs
4 containing improvements to the manufacturing techniques used by Glidewell to
5 make BruxZir solid zirconia crowns and bridges. These updated IFUs can also be
6 accessed and downloaded online at www.bruxzir.com under the password protected
7 section. These IFUs provide a complete set of instructions for the manufacturing
8 of crowns and bridges using BruxZir-brand zirconia milling blanks, including but
9 not limited to sintering, staining, and cleaning techniques.

10 9. Upon request, Glidewell provides in-person training to its Authorized
11 BruxZir Labs concerning the manufacturing techniques, such as the sintering,
12 staining, cleaning, cementing, and bonding techniques, used by Glidewell to make
13 BruxZir solid zirconia crowns and bridges. By way of example, Glidewell has
14 provided in-person training to Protec Dental Laboratories Ltd., Via Digital
15 Solutions, Bigler Dental Ceramics, Albensi Laboratories, A&M Dental
16 Laboratories, and Green Dental Laboratories, Inc.

17 10. Additionally, representatives from Authorized BruxZir Labs receive
18 such training at the BruxZir Summit held at Glidewell. Glidewell has hosted
19 BruxZir Summits in January 2012 and in May 2012. The attendees at these two
20 BruxZir Summit were comprised principally of representatives from the Authorized
21 BruxZir Labs. The BruxZir Summit provide technical presentations on BruxZir
22 solid zirconia crowns and bridges, and extensive training on the preparation
23 techniques used by Glidewell to make BruxZir solid zirconia crowns and bridges.

24 11. Glidewell provides extensive technical support for the Authorized
25 BruxZir Labs if they encounter any quality issues in connection with the
26 manufacture of BruxZir-brand crowns and bridges. Typically, an Authorized
27 BruxZir Lab sends the problematic BruxZir solid zirconia crown or bridge to
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1 Glidewell for analysis. In response, Glidewell provides personalized assistance to
2 help the Authorized BruxZir Lab rectify the problem.

3 12. In sum, Glidewell consistently provides extensive training, support,
4 and instructions to the Authorized BruxZir Labs to ensure that they are making
5 BruxZir solid zirconia crowns and bridges that are of equal quality to those made
6 by Glidewell.

7 13. These policies and practices have been in place from institution of the
8 Authorized BruxZir Labs program in 2009 to the present. The purpose and effect
9 of these policies and practices is to enable Glidewell to ensure that products sold by
10 the Authorized BruxZir Labs under the BruxZir mark maintain a level of quality
11 consistent with that of BruxZir-brand products made and sold directly by Glidewell.
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1 I declare under the penalty of perjury under the laws of the United States of
2 America that the foregoing is true and correct, and that this declaration was
3 executed on November 26th, 2012, at Irvine, California.
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8 Robin Carden
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Snell & Wilmer

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Exhibit V

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11 Attorneys for Plaintiff
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20 vs.

21 KEATING DENTAL ARTS, INC.,

22 Defendant.

Case No. SACV11-01309-DOC(ANx)

**SUPPLEMENTAL DECLARATION
OF ROBIN BARTOLO IN SUPPORT
OF JAMES R. GLIDEWELL
DENTAL CERAMICS, INC.'S
OPPOSITIONS TO DEFENDANT'S
MOTIONS FOR SUMMARY
JUDGMENT**

Hearing

Date: December 17, 2012
Time: 8:30 a.m.
Cttrm: 9D, Hon. David O. Carter

Pre-Trial Conf.: January 28, 2013
Jury Trial: February 26, 2013

23 AND RELATED
24 COUNTERCLAIMS.

1 I, Robin Bartolo, declare as follows:

2 1. I am Sales Manager for Glidewell Direct, a division of plaintiff James
3 R. Glidewell Dental Ceramics, Inc. d/b/a Glidewell Laboratories ("Glidewell"), and
4 have held this position since I joined Glidewell in January 2009. I have personal
5 knowledge of the statements contained in this declaration.

6 2. As Sales Manager for Glidewell Direct, my primary duties focus on
7 managing the sales of Glidewell products to current and potential customers, and
8 promoting Glidewell's authorized BruxZir dental lab program to dental labs.

9 3. In particular, Glidewell Direct focuses on the advertising, marketing,
10 and sales of Glidewell BruxZir products such as milling blanks, milling machines,
11 sintering machines, coloring kits, and other complementary products for dental labs
12 to fabricate BruxZir zirconia crowns.

13 4. Glidewell Direct offers dental labs the opportunity to become an
14 authorized dental lab for making BruxZir solid zirconia crowns and bridges
15 ("Authorized BruxZir Lab"). To become an Authorized BruxZir Lab, the dental lab
16 must pass a three-month probation period, during which the dental lab shows a
17 consistent purchase of BruxZir milling blanks and coloring kits over three months.
18 A pattern of consistent orders provides Glidewell with assurance that the dental lab
19 is using BruxZir materials to make BruxZir solid zirconia crowns and bridges. In
20 particular, the purchase of the BruxZir-brand zirconia milling blanks and the
21 coloring kits are particularly important because these two inputs largely ensure that
22 the end-product crown or bridge will have the strength, hardness and esthetic
23 quality that sets the BruxZir-brand solid zirconia crowns and bridges apart from the
24 competition.

25 5. Alternatively, a dental lab can become an Authorized BruxZir Lab by
26 outsourcing directly to Glidewell the fabrication of BruxZir solid zirconia crowns
27 and bridges (i.e. by sending to Glidewell a digital or physical impression model to
28 fabricate).

1 6. Both Glidewell and the Authorized BruxZir Labs reap the benefits of
2 Glidewell's strong marketing campaign designed to promote BruxZir solid zirconia
3 crowns and bridges. This marketing campaign consists of (i) a listing of all the
4 Authorized BruxZir Labs on Glidewell's dedicated BruxZir website, in Glidewell's
5 quarterly Rx booklet, and in e-mail blasts, (ii) quarterly Rx booklet campaigns sent
6 out to about 120,000 doctors across the United States, (iii) letter campaigns, and
7 (iv) trade shows. These marketing benefits are provided to Authorized BruxZir
8 Labs at no additional cost.

9 7. Because of these marketing benefits, as well as the strong technical
10 support that Glidewell provides to the Authorized BruxZir Labs, Glidewell has a
11 strong and close working relationship with Authorized BruxZir Labs. Indeed,
12 representatives from Authorized BruxZir Labs have told me that they are very
13 happy and satisfied with this relationship.

14 8. Glidewell Direct personnel routinely communicate with Authorized
15 BruxZir Labs concerning quality control issues. Glidewell Direct personnel, as part
16 of their day to day job functions, routinely reach out to Authorized BruxZir Labs by
17 email or telephone regarding various issues, including quality issues, and quality
18 and technical issues are regularly discussed in communications initiated for other
19 purposes as well. This ongoing conversation between Glidewell and the
20 Authorized BruxZir Labs contributes to a relationship in which quality issues are
21 typically avoided before they become a problem, or are addressed quickly once they
22 become apparent.

23 9. Glidewell provides to its Authorized BruxZir Labs detailed
24 Instructions For Use ("IFUs") for manufacturing of crowns and bridges using
25 BruxZir-brand zirconia milling blanks. Videos detailing every step of the
26 manufacturing of crowns and bridges using BruxZir-brand zirconia milling blanks
27 are available to the Authorized BruxZir Labs online at www.bruxzir.com under the
28 password protected section.

1 10. In addition, Glidewell sends to Authorized BruxZir Labs via e-mail
2 updated IFUs containing improvements to the manufacturing techniques used by
3 Glidewell to make BruxZir solid zirconia crowns and bridges. These updated IFUs
4 can also be accessed and downloaded online at www.bruxzir.com under the
5 password protected section. These IFUs provide a complete set of instructions for
6 the manufacturing of crowns and bridges using BruxZir-brand zirconia milling
7 blanks, including but not limited to sintering, staining, and cleaning techniques.

8 11. Upon request, Glidewell provides in-person training to its Authorized
9 BruxZir Labs concerning the manufacturing techniques, such as the sintering,
10 staining, cleaning, cementing, and bonding techniques, used by Glidewell to make
11 BruxZir solid zirconia crowns and bridges. By way of example, Glidewell has
12 provided in-person training to Protec Dental Laboratories Ltd., Via Digital
13 Solutions, Bigler Dental Ceramics, Albensi Laboratories, A&M Dental
14 Laboratories, and Green Dental Laboratories, Inc.

15 12. Additionally, representatives from Authorized BruxZir Labs receive
16 such training at the BruxZir Summit held at Glidewell. Glidewell has hosted
17 BruxZir Summits in January 2012 and in May 2012. The attendees at these two
18 BruxZir Summit were comprised principally of representatives from the Authorized
19 BruxZir Labs. The BruxZir Summit provide technical presentations on BruxZir
20 solid zirconia crowns and bridges, and extensive training on the preparation
21 techniques used by Glidewell to make BruxZir solid zirconia crowns and bridges.

22 13. Glidewell provides extensive technical support for its Authorized
23 BruxZir Labs if they encounter any quality issues in connection with the
24 manufacture of BruxZir-brand crowns and bridges. Typically, an Authorized
25 BruxZir Lab sends the problematic BruxZir solid zirconia crown or bridge to
26 Glidewell for analysis. In response, Glidewell provides personalized assistance to
27 help the Authorized BruxZir Lab rectify the problem.
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14. Glidewell's technical support is also provided directly to any dentist who purchased a BruxZir solid zirconia crown and/or bridge from an Authorized BruxZir Lab. This provides a feedback mechanism for quality assurance because if a dentist notices any discrepancies in a BruxZir solid zirconia crown purchased from an Authorized BruxZir Lab, he or she can contact Glidewell directly to resolve this issue. As part of Glidewell's regular practice, Glidewell would then contact this Authorized BruxZir Lab to ensure that moving forward, personnel of such dental labs are properly trained and equipped to make BruxZir solid zirconia crowns and bridges that are of the same quality as those made by Glidewell, using the BruxZir-brand zirconia milling blanks sold by Glidewell.

15. As the largest dental laboratory in the United States, Glidewell is very active in the dental community bringing awareness to the BruxZir solid zirconia crowns and bridges. In particular, as Sales Manager for Glidewell Direct, I regularly attend dental trade shows that draw thousands of dentists and dental labs across the United States. At these trade shows, I promote and establish Glidewell's BruxZir mark as an identifier of Glidewell as a source of zirconia crown and bridge products. In particular, since joining Glidewell in January 2009, I have attended the following 17 trade shows: (1) Lab Day West, May 9, 2009, Garden Grove, California, approximately 400 dental labs in attendance, (2) California Dental Association ("CDA") Dental Convention, May 13, 2009, Anaheim, California, approximately 6,000 dentists in attendance, (3) CDA Dental Convention, May 14-15, 2010, Anaheim, California, approximately 6,000 dentists in attendance, (4) Lab Day West, May 8, 2010, Garden Grove, California, approximately 400 dental labs in attendance, (5) American Dental Association ("ADA") Annual Session, October 8-10, 2010, Orlando, Florida, approximately 7,000 dentists in attendance, (6) Lab Management Today ("LMT") Chicago Midwinter Meeting, February 23-26, 2011, Chicago, Illinois, approximately 500 dental labs in attendance, (7) Lab Day West, May 7, 2011, Garden Grove, California, approximately 400 dental labs in

1 attendance, (8) CDA Dental Convention, May 12, 2011, Anaheim, California,
2 approximately 6,000 dentists in attendance, (9) American Academy of Dental Sleep
3 Medicine Annual Meeting, June 12-16, 2011, Minneapolis, Minnesota,
4 approximately 2,000 dentists in attendance, (10) CDA Dental Convention, October
5 9-11, 2011, San Francisco, California, approximately 5,000 dentists in attendance,
6 (11) Dental Laboratory Owners Association of California ("DLOAC") Expo and
7 Symposium, November 17-18, 2011, Pasadena, California, approximately 200
8 dental labs in attendance, (12) LMT Chicago Midwinter Meeting, February 22-25,
9 2012, Chicago, Illinois, approximately 500 dental labs in attendance, (13) Colorado
10 Dental Lab Association Meeting, March 23-24, 2012, approximately 30 dental labs
11 in attendance, (14) CDA Dental Convention, May 3-4, 2012 Anaheim, California,
12 approximately 6,000 dentists in attendance, (15) Lab Day West, May 5, 2012,
13 Garden Grove, California, approximately 400 dental labs in attendance, (16) ADA
14 Annual Session, October 12-20, 2012, San Francisco, California, approximately
15 8,700 dentists in attendance, and (17) DLOAC Expo and Symposium, November
16 16-17, 2012, Anaheim, California, approximately 200 dental labs in attendance.

17 16. At these trade shows, I routinely give samples of the BruxZir solid
18 zirconia crowns to dentists, and encourage the dentists to compare the BruxZir solid
19 zirconia crowns with other solid zirconia crowns. This provides another feedback
20 mechanism for Glidewell because, if a dentist notices any discrepancies with a
21 BruxZir solid zirconia crown purchased from an Authorized BruxZir Lab from the
22 sample received, the dentist can contact Glidewell directly to investigate this issue.
23 As part of Glidewell's regular practice, Glidewell would then contact this
24 Authorized BruxZir Lab to ensure that moving forward, personnel of such dental
25 labs are properly trained and equipped to make BruxZir solid zirconia crowns and
26 bridges that are of the same quality as those made by Glidewell, using the BruxZir-
27 brand zirconia milling blanks sold by Glidewell.
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1 17. Additionally, Glidewell will follow up with the Authorized BruxZir
2 Labs to inquire about their experience with the BruxZir materials, including any
3 problems that may be having with the BruxZir materials, and any other suggestions
4 and feedback regarding same.

5 18. Glidewell routinely monitors the Authorized BruxZir Labs to ensure
6 that they are consistently purchasing BruxZir milling blanks and coloring kits. A
7 pattern of consistent orders provides Glidewell with assurance that the dental lab is
8 using BruxZir materials to make BruxZir solid zirconia crowns and bridges. In
9 particular, the purchase of the BruxZir-brand zirconia milling blanks and the
10 coloring kits are particularly important because these two inputs largely ensure that
11 the end-product crown or bridge will have the strength, hardness and esthetic
12 quality that sets the BruxZir-brand solid zirconia crowns and bridges apart from the
13 competition.

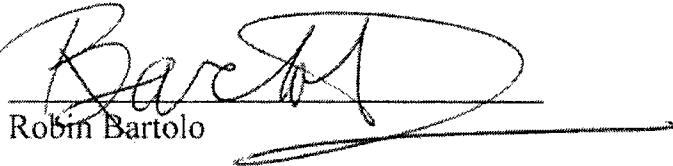
14 19. An Authorized BruxZir Lab's failure to consistently purchase BruxZir
15 milling blanks and coloring kits is a warning sign that that lab may be failing to
16 make BruxZir solid zirconia crowns and bridges that are of equal quality to those
17 made by Glidewell. Thus, Glidewell has a practice of terminating dental labs from
18 its Authorized BruxZir Labs program for failing to consistently purchase BruxZir
19 milling blanks and coloring kits. These dental labs are removed from the list of
20 Authorized BruxZir Labs. After termination, Glidewell's practice is to ensure that
21 these terminated dental labs are no longer marketing BruxZir products. If a
22 terminated dental lab still holds itself out as marketing BruxZir-brand products,
23 Glidewell will immediately notify such lab to stop. I personally have made several
24 such calls to terminated dental labs. If the lab fails to comply, the matter is referred
25 to Glidewell's Counsel, Mr. Keith Allred.

26 20. In sum, Glidewell consistently provides extensive training, support,
27 and instructions to its Authorized BruxZir Labs to ensure that they are making
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1 BruxZir solid zirconia crowns and bridges that are of equal quality to those made
2 by Glidewell.

3 21. These policies and practices have been in place from institution of the
4 Authorized BruxZir Labs program in 2009 to the present. The purpose and effect
5 of these policies and practices is to enable Glidewell to ensure that products sold by
6 the Authorized BruxZir Labs under the BruxZir mark maintain a level of quality
7 consistent with that of BruxZir-brand products made and sold directly by Glidewell.
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2 I declare under the penalty of perjury under the laws of the United States of
3 America that the foregoing is true and correct, and that this declaration was
4 executed on November 26, 2012, at IRVINE, California.

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8 Robin Bartolo
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Snell & Wilmer

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Exhibit W

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11 Attorneys for Plaintiff
12 James R. Glidewell Dental Ceramics, Inc.
13 d/b/a Glidewell Laboratories

14 UNITED STATES DISTRICT COURT
15 CENTRAL DISTRICT OF CALIFORNIA
16 SOUTHERN DIVISION

17 JAMES R. GLIDEWELL DENTAL
18 CERAMICS, INC.,

19 Plaintiff,

20 vs.

21 KEATING DENTAL ARTS, INC.,

22 Defendant.

23 AND RELATED
24 COUNTERCLAIMS.

Case No. SACV11-01309-DOC(ANx)

**SUPPLEMENTAL DECLARATION
OF KEITH ALLRED IN SUPPORT
OF JAMES R. GLIDEWELL
DENTAL CERAMICS, INC.'S
OPPOSITIONS TO DEFENDANT'S
MOTIONS FOR SUMMARY
JUDGMENT**

Hearing

Date: December 17, 2012
Time: 8:30 a.m.
Ctvm: 9D, Hon. David O. Carter

Pre-Trial Conf.: January 28, 2013
Jury Trial: February 26, 2013

DECLARATION OF KEITH ALLRED
CASE NO. SACV11-01309 DOC (ANx)

1 I, Keith Allred, declare as follows:

2 1. I am General Counsel of plaintiff James R. Glidewell Dental
3 Ceramics, Inc. d/b/a Glidewell Laboratories ("Glidewell") and have held this
4 position at all times relevant to this lawsuit. Except where noted to be otherwise, I
5 state the following of my own knowledge and, if called upon to do so, could and
6 would testify competently to the following.

7 2. Glidewell has enforced its BruxZir mark against companies offering
8 solid zirconia dental restoration products only where we believe that the trademarks
9 are confusingly similar to the BruxZir mark, taking all relevant considerations into
10 account.

11 3. Glidewell has not pursued enforcement activity against a variety of
12 trademarks used by dental laboratories that contain the word "Brux" in their marks.
13 Examples include: Brux XXX, Brux-Checker, Dr. Brux, and Brux-eze, which are
14 trademarks for products for patients who suffer from bruxism.

15 4. I sent Barth Dental Labs a cease and desist letter concerning the "Z-
16 Brux" brand on September 26, 2012, because I believe that the use of this mark to
17 promote the particular product sold under the mark – a full contour zirconia crown
18 – is likely to cause confusion among customers of Glidewell's BruxZir-brand
19 dental restoration products. I expect Barth Dental Labs's use of this mark to be
20 discontinued shortly.

21 5. "Z-Brux" (Assured Dental Lab), "Brux" (Authentic Dental), "Full
22 Solid Zirconia" (China Dental Outsourcing), "Full Solid Bruxer Zirconia" (Fusion
23 Dental Lab), and "BRUXER All Zirconia Crown" (Pittman Dental) were
24 discontinued after the dental labs that were using or marketing products under those
25 names received cease and desist letters from me, as General Counsel of Glidewell.

26 6. Glidewell has just learned of infringing activity by Mascola Esthetics
27 and I plan to send a cease and desist letter shortly.
28

1 I declare under the penalty of perjury under the laws of the United States of
2 America that the foregoing is true and correct.

3 Executed on November 26, 2012 in Newport Beach, California.
4

5 
6 Keith D. Allred

Snell & Wilmer

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DECLARATION OF KEITH ALLRED
CASE NO. SACV11-01309 DOC (ANx)

- 2 -

16195759.2

Exhibit X

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11 Attorneys for Plaintiff
12 James R. Glidewell Dental Ceramics, Inc.
13 d/b/a Glidewell Laboratories

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17 JAMES R. GLIDEWELL DENTAL
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19 Plaintiff,

20 vs.

21 KEATING DENTAL ARTS, INC.,

22 Defendant.

Case No. SACV11-01309-DOC(ANx)

**SUPPLEMENTAL DECLARATION
OF DR. RONALD GOLDSTEIN IN
SUPPORT OF JAMES R.
GLIDEWELL DENTAL CERAMICS,
INC.'S OPPOSITIONS TO
DEFENDANT'S MOTIONS FOR
SUMMARY JUDGMENT**

Hearing

Date: December 17, 2012

Time: 8:30 a.m.

Ctrm: 9D, Hon. David O. Carter

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Jury Trial: February 26, 2013

23 AND RELATED
24 COUNTERCLAIMS.

1 I, Dr. Ronald Goldstein, declare as follows:

2 1. I am an expert witness for plaintiff James R. Glidewell Dental
3 Ceramics, Inc. d/b/a Glidewell Laboratories ("Glidewell"). Unless otherwise
4 stated, I have personal and firsthand knowledge of the facts set forth in this
5 declaration, and I could and would testify competently to such facts if called as a
6 witness.

7 2. I reviewed the Declaration of Dr. David W. Eggleston in Support of
8 Keating Dental Arts, Inc.'s ("Keating") Motions for Summary Judgment [Docket
9 No. ("Dkt#") 93]. Dr. Eggleston attached to his declaration a copy of his: (1)
10 Expert Report, dated September 15, 2012 ("Eggleston Expert Report") [Dkt#93-1],
11 (2) First Supplemental Expert Report dated October 15, 2012 ("Eggleston First
12 Supplemental Expert Report") [Dkt#93-2], and (3) Rebuttal Expert Report dated
13 October 15, 2012 ("Eggleston Rebuttal Expert Report") [Dkt#93-3]. I respond to
14 Dr. Eggleston's reports below.

15 3. Dr. Eggleston's reports are deficient in several respects. First, BruxZir
16 crowns are not only for people who brux; but rather are used for people who need
17 an aesthetically pleasing and strong crown, regardless of why they might need that
18 type of product. The product serves a wider purpose than restoration of damage
19 caused by bruxism. Dr. Eggleston acknowledged at his deposition that if that is
20 true, his opinion on the genericness of the term "bruxer" for crown may have to be
21 revised.

22 4. Dr. Eggleston's Expert Report fails to show that "bruxer crown" is the
23 generic name for a full zirconia dental crown. Dr. Eggleston lumps together
24 numerous pieces of "evidence" which, when parsed out, do not support his
25 contention that the "bruxer crown" is the generic name for a full zirconia dental
26 crown. [Dkt#93-1] Altogether, I identified 19 distinct pieces (or categories) of
27
28

evidence upon which Dr. Eggleston relies, which I have reviewed. [*Id.*] They are listed in the following chart below:

Evid. #	Date	Description	Document	Page
1	7/2008	Article: Association Between Self-Reported Bruxism Activity and Occurrence of Dental Attrition, Abreaction, and Occlusal Puts on Natural Teeth – Journal of Prosthetic Dentistry	Eggleston Expert Report	12
2	1/2007	Thesis, Tolley: The Efficacy of the BiteStrip in Determining Patients Awareness of Nocturnal Bruxism	Eggleston Expert Report	13
3	2/2011	Article, Carden: A Changing Direction in Dentistry: Full-Contour Zirconia	Eggleston Expert Report	13
4	7/2007	Article, Suganuma: The Effect of Bruxism on Peridontal Sensation in the Molar Region: A Pilot Study	Eggleston Expert Report	13
5	1/2007	Article, Schneider: Maladaptive Coping Strategies in Patients with Bruxism Compared to Non-Bruxing Controls	Eggleston Expert Report	13
6	10/2008	Article, Ono: Effect of Sleep Bruxism on Periodontal Sensation and Tooth Displacement in the Molar Region	Eggleston Expert Report	13
7	1/1999	Article, Molina: A Clinical Study of Specific Signs and Symptoms of CMD in Bruxers Classified by the Degree of Severity	Eggleston Expert Report	14
8	10/2009 8/2012	Glidewell YouTube.com videos http://www.youtube.com/user/glidewelldental	Eggleston Expert Report	14, 17
9	N/A	Glidewell.com (Glidewelldental.com) – “BruxZir: Virtually Bulletproof”	Eggleston Expert Report	15

10	N/A	Barth Dental Laboratories	Eggleston Expert Report	15
11	N/A	Keller Laboratories – http://kellerlab.com/193/products/bruxzir.php	Eggleston Expert Report	15
12	N/A	Axis Dental Milling – http://www.axisdentalmilling.com/bruxzir.html	Eggleston Expert Report	15
13	N/A	Crown Dental Studio – http://crowndentalstudio.com/bruxzir.html	Eggleston Expert Report	15
14	N/A	Assured Dental Lab – http://assuredentallabinc.com/prep.html	Eggleston Expert Report	16
15	N/A	A crown made from zirconia is referred to by dentists and other dental professionals as a bruxer crown	Eggleston Expert Report	16
16	2/2011	YouTube, R-Dent: How to Adjust the Bruxir Crown – http://youtube/sTTwU1LDvjU	Eggleston Expert Report	16
17	10/2009	YouTube, Glidewell: Introduction to BruxZir Total Zirconia – http://yoube/tUpp_DOY4Vw	Eggleston Expert Report	17
18	N/A	Other zirconia products: York Dental Lab (“Bruxer” crown), Barth Dental Lab (“Z-Brux” crown), Mascola Esthetics Dental Lab (“Xtreme Bruxer”), Showcase Dental Lab (“Zir-Bruxer Crown”), R-Dent Laboratory (R-Brux Crown), Infinity Dental Lab (“Bruxer Crown”), Assured Dental Lab (“IPS e.max Bruxer crown”), China Dental Outsourcing (All Zirconia for Bruxers”)	Eggleston Expert Report	17-18
19	N/A	Keating Dental Arts lab orders	Eggleston Expert Report	18

5. Items 1-7 are articles that stand for little more than the proposition that “bruxer” is a common word for a person who bruxes --- i.e., who grinds his or her

1 teeth. None of these articles, however, state that there is such a thing as a “bruxer
2 crown.” They, therefore, do not support Dr. Eggleston’s assertion.

3 6. Item 8 is a Glidewell YouTube.com video. Dr. Eggleston apparently
4 is citing this as alleged evidence that Glidewell uses BruxZir and bruxer as phonetic
5 equivalents. However, again, even if this were true, it is not evidence that members
6 of the relevant consuming public use “bruxer crown” as a generic term.

7 7. Items 9-14 are all cites to various dental labs, which according to Dr.
8 Eggleston, support the proposition that Glidewell’s BruxZir crown is primarily
9 intended for people with bruxism. However, that is not the point. That does not
10 prove that dentists or dental labs use the term “bruxer crown” as a generic term.

11 8. Moreover, upon analysis, I was able to determine that both Keller
12 (item 11) and Crown Dental Studio (item 13) are authorized Glidewell labs. They
13 are, therefore, likely referring to Glidewell’s products and not using the term in a
14 generic manner. Similarly, axisdentalmilling.com (item 12) refers to a registered
15 TM - “Bruxzir (R)”- suggesting they are using the Glidewell product. There isn’t
16 any other registered “bruxzir” mark. Item 15 is simply Dr. Eggleston’s own self-
17 pronounced statement that dentists and other dental professionals refer to full
18 zirconia crowns as “bruxer crowns.” However, he does not speak from personal
19 knowledge and states that he, himself, routinely refers to a full zirconia crown as a
20 “bruxer crown.”

21 9. Item 16 is a YouTube video from R-Dent about “How to Adjust the
22 Bruxzir Crown” and does not indicate that the speaker is using the term generically.
23 Indeed, the dentist/speaker states that “some laboratories call it the BruxZir crown;
24 we call it the r-brux crown.” In context, this is not a generic use – especially since
25 R-Dent is an authorized Glidewell lab.

26 10. Item 17 is a YouTube video by Glidewell that Dr. Eggleston appears to
27 cite as an example of Glidewell using BruxZir and bruxer as phonetic equivalents.
28

1 However, when one looks at the video, the speaker uses BruxZir as a trademark.
2 Again, phonetic equivalence, even if demonstrated, would not make the term
3 “BruxZir” a generic name for a type of crown.

4 11. Item 18 is a collection of cites to webpages purportedly reflecting uses
5 by several dental labs of the term bruxer in a generic manner. These websites do
6 not show that bruxer or BruxZir is a generic name for a type of solid zirconia dental
7 crown:

- 8 • York Dental Lab’s website consistently uses BruxZir multiple times
9 with the same spelling and capitalization. The use of BruxZir on
10 York’s website is not a generic use. The product description does use
11 “Bruxer” once to refer to the crown; however this is likely a mistake in
12 light of the previous consistent use.
- 13 • The Barth website indicates that zirconium crowns are intended in part
14 for bruxers. It does not use “bruxer crown” as a generic term.
- 15 • Mascola’s use of “Xtreme Bruxer” on an Rx form is descriptive use at
16 most and not a generic use.
- 17 • Showcase no longer uses the name Zir-Bruxer and now refers to its
18 product as Full Contour Zirconia.
- 19 • R-Dent Dental Laboratory is apparently a Glidewell authorized lab
20 which consistently uses BruxZir.
- 21 • Infinity Dental Lab appears to be using the term “‘Bruxer’ crowns” in
22 a descriptive rather than a generic sense. This is consistent with the
23 fact that “Bruxer” is in quotes.
- 24 • Assured’s use is ambiguous but may amount to descriptive use.
- 25 • China Dental Outsourcing does not currently use the term bruxer
26 crown.

1 12. Item 19 is a collection of approximately 50 Keating Dental Arts
2 written lab orders. The contents of these materials – which I reviewed but do not
3 recount here in order to avoid any issue concerning whether this declaration
4 contains confidential information – is, in my view, evidence of actual confusion,
5 not evidence that the term “BruxZir crown” is generic.

6 13. Thus, when it is parsed out, Dr. Eggleston’s Expert Report offers very
7 little documentary evidence which even arguably could be taken as examples of
8 relevant professionals using “bruxer crown” in a generic manner. In my view, that
9 is not sufficient to demonstrate that dental professionals generally use the term
10 “bruxer crown” generically.

11 14. Dr. Eggleston’s supplemental and rebuttal reports fare no better.
12 [Dkt#93-2, 93-3.] They cite almost exclusively to depositions from this case in an
13 attempt to show that bruxer and BruxZir are phonetic equivalents. [Id.] However,
14 that is not the same as showing that BruxZir or Bruxer is widely used as the generic
15 name for a type of dental crown.

16 15. Dr. Eggleston’s supplemental and rebuttal reports also misconstrue the
17 evidence. For example, in his Rebuttal Report, Dr. Eggleston makes reference to a
18 forum post from the Dental Lab Network entitled “How to glaze a BruxZir Crown”
19 with date ranges from 10-09-2009 to 6-11-2011. [Dkt#93-3.] Dr. Eggleston claims
20 that “the ongoing discussion is clearly NOT discussing Glidewell’s product, but
21 rather is discussing the glazing of zirconia crowns from any source (whether or not
22 from Glidewell).” [Id.] What Dr. Eggleston fails to note is that while other
23 products were mentioned within this thread, it is clear that the participants were
24 well aware that BruxZir is a Glidewell product and not a generic term for a zirconia
25 crown indicated for bruxers. Examples would include, but are not limited to, the
26 following posts:

27 “Mark Jackson” of Precision Ceramics Dental Laboratory:
28

- 1 • 11-22-2010 - "if you want to know how to Glaze a BruxZir restoration,
2 simply review your BruxZir training materials "
- 3 • 11-23-2010 - "As for BruxZir (and FDA registered monolithic
4 zirconia) simulated wear studies, solubility and other performance
5 benchmarks have already been performed."
- 6 • 2nd post from 11-23-2010 - "These doctors are asking about BruxZir
7 and being mislead and lied to, and UNKNOWINGLY being switched
8 to inferior and inappropriate materials."
- 9 • 3rd post from 11-23-2010 - "There is no SIMILAR product.
10 Comparing regular zirconia to BruxZir is like comparing pressable
11 porcelain to Lithium Disilicate. . . . All they need to do, is contact
12 Glidewell,"
- 13 • 11-23-2010 at 6:10 p.m. "At the moment only BruxZir that I know of.
14 All the others use either Lava or Metoxit as their predicate device.
15 Crystal zirconia claims to be an EXACT replica of Metoxit and is only
16 approved for use as a coping."
- 17 • 11-26-2010 "3M spoke with Glidewell about licensing BruxZir. It
18 doesn't fit with their business plan, so they have applied for a
19 provisional application for Lava as a full contour material, but even if
20 it gets approved, as I'm sure it and others will, it was never designed
21 [sic] to be use that way and will not compare to the specialized
22 products that WERE.", and many more],
23 "Charles007":
24 • 10-07-2010 "I also glazed a 3 unit full contour zir bridge . . . This was
25 not the Glidewell Bruxzir material";
26 • 11-01-2010 "I'm not using Glidewells [sic] bruxzir [sic] or Chrystal
27 Diamond..... Top secret full contour zir "
28

- 11-24-2010 "I take a day off DLN and come back to see all hell breaks loose over me trying to make full contoured zirconia look better trying different stain kits..... ALL of the full contoured zirconia materials I've seen look opaque, including BruxZir....."
- 11-25-2010 "Doug, Glidewell has spent mega \$\$ on BruxZir, don't think any lab using this product will be a tester, I would call it a Mega money maker materialOther companies with try to "one up it" which will eventually benefit us all in the long run. Who knows what the next full contoured material will be and when it will come out..... I keep hearing about new materials, and I definitely don't want to be a tester."

"TheLabGuy"

- 11-22-2010 "If it's any consolation.....I don't sell any full contour zirconia or bruxzir";
- 11-23-2010 "Most of us are all still riding the E.max tsunami and full contour zirconia or BruxZir is still in it's infantile stages and why everyone here is asking so many questions about it.";
- 2nd post from 11-23-2010 "Now, as John mentioned, if you would like to explain the differences in BruxZir and Zirconia and why it's a better product (preferably not because the FDA says so)";
- 3rd post from 11-23-2010 "A question: Do most of the manufacturers out there have a FDA registered (501) full contour zirconia restoration available on the market? Or is BruxZir the only one (even though its composition is different)."

"JohnWilson," the moderator:

- 11-22-2010 "As for counterfeiting I know you are one of the few that actually has the glidewell [sic] product at PCDL, and you have a

1 vested interest in maintaining the brand name. With that being said it is
2 a mistake and illegal to use the name Bruxzi [sic] to refer to any other
3 product other than a Bruxzi [sic].”;

- 4 • 11-23-2010 “As for the fact that we are in the infancy of Monolithic ZI
5 restorations, the brand people have heard of is of course because of
6 Glidewells amazing marketing budget.”;
- 7 • 2nd post from 11-23-2010 “Since it’s obvious that I do not know the
8 difference between a BruxZir crown and a generic Full contour Zir
9 crown perhaps you can share the difference with us all. Not just the
10 fact that there is a 510k registration on the specific product. Oh and
11 BTW what other labs have bought into the BRUXzir system from
12 glidewell?”

13 “DMC” aka “C.D.T Crazy Dental Tech”:

- 14 • 11-23-2010 “I’ll make full Zirconia all day long and not lose any sleep
15 over it. . . . How does it get any cheaper than the home-made Zirconia
16 from Glidewell?LOL What if I get a prescription with the word
17 Bruxzir mis-spelled?”;
- 18 • 2nd post from 11-23-2010 “I can tell you that we have made 100%
19 Zirconia crowns for over 100 Labs! I do it everyday. They all knew it
20 was not a Glidewell product. Good luck trying to sue all of us.”
- 21 • 3rd post from 11-23-2010 at 5:32 p.m. “I have only the best of the best
22 in my lab. I would NEVER sell that chit Zirconia from Glidewell[sic]!”

23 16. Moreover, much of the “evidence” on which Dr. Eggleston relies is
24 legally not germane to the genericness issue in this case. I have been informed that,
25 in order to prevail on its genericness counterclaim, Keating must prove that BruxZir
26 was the generic name for full zirconia dental crowns by September, 2010 or May,
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1 2011 at the latest– the dates that Keating entered the market in competition with
2 Glidewell.

3 17. Here, it is my understanding that Keating entered the dental crown
4 market – using the KDZ Bruxer mark – in either September 2010 when it began
5 selling zirconia crowns under the KDZ Bruxer name to existing customers, but no
6 later than May, 2011 when it publicly advertised zirconia crowns under that name.
7 Yet, in supporting both his “phonetic equivalence” and “genericness” opinions, Dr.
8 Eggleston relies almost entirely on excerpts from journals , articles, videos and the
9 internet which either occurred after May, 2011 or which are not dated. [Dkt#93-1]

10 18. To the extent that Dr. Eggleston relies on evidence before Keating
11 entered the market, it is not evidence of generic use of the term “bruxer” as a type
12 of zirconia crown. Indeed, in Dr. Eggleston’s Expert Report, the only evidence he
13 cites before September 2010 are articles (items 1-7 in the chart above) that show
14 that “bruxer” is a word for a person who grinds. [Dkt#93-1.] In his Expert
15 Rebuttal Report, Dr. Eggleston cites a blog (photodontist.blogspot.com) to support
16 the assertion that BruxZir crown is used generically. [Dkt#93-3.] Yet, Dr.
17 Eggleston’s own description of the blog – and a plain reading of the blog itself –
18 amply demonstrate that the author (a Mr. Vu Le) is using the BruxZir name as a
19 trademark. Indeed, Mr. Le mentions Glidewell Labs specifically! In a follow up to
20 his blog entry, Dr. Le explicitly indicates his knowledge that “[g]lidewell Labs
21 markets them under the brand name Bruxzir”¹

22 19. Dr. Eggleston has not offered any credible evidence that BruxZir – or
23 its alleged phonetic equivalent “bruxer” – was predominantly seen as the generic
24 name for full zirconia crowns as of September 2010 or even by May, 2011. Nor
25 has he shown that to be the case today.

26
27
28 ¹ <http://photodontist.blogspot.com/2009/10/bruxzir-vs-pfm-round-2-full-zirconia-vs.html>.

1 20. Incidental generic uses do not render a mark generic. *See* McCarthy on
2 Trademarks and Unfair Competition § 12:6 (4th Ed.) (stating that a term must be
3 predominantly seen as generic before it will be considered legally generic and
4 suggesting as a bench mark that at least 75% of the relevant consuming public view
5 of the mark primarily as the generic name for that type of product and not primarily
6 as a brand name.); *see also* 15 U.S.C.A § 1064(3); McCarthy on Trademarks and
7 Unfair Competition § 12:8 (4th ed.) citing *Coca-Cola Co. v. Overland, Inc.*, 692
8 F.2d 1250 (9th Cir. 1982) (COKE not a generic name).

9 21. The evidence cited by Dr. Eggleston demonstrates that BruxZir and/or
10 Bruxer have not been understood by dentists or dental labs to be generic but rather
11 to refer to Glidewell's products. *See, e.g.*, posts by "Mark Jackson" of Precision
12 Ceramics Dental Laboratory [11-22-2010; 11-23-2010; 2nd post from 11-23-2010;
13 3rd post from 11-23-2010; 4th post from 11-23-2010; 11-26-2010]; "Charles007"
14 [10-7-2010; 11-01-2010; 11-24-2010; 11-25-2010]; "TheLabGuy" [11-22-2010;
15 2nd post from 11-22-2010; 11-23-2010; 2nd post from 11-23-2010; 3rd post from
16 11-23-2010]; "JohnWilson"[11-22-2010; 11-23-2010; 2nd post from 11-23-2010;
17 11-23-2010 at 6:18 p.m.]; "Al." [11-24-2010] and "DMC" aka "C.D.T Crazy Dental
18 Tech" [11-23-2010; 2nd post from 11-23-2010; 3rd post from 11-23-2010 at 5:32
19 p.m.; 11-29-2010].

20 22. Dr. Eggleston does not cite sufficient evidence to support an opinion
21 that as of September, 2010 or May, 2011, a majority of dentists or dental labs used
22 the terms "BruxZir crowns" or "bruxer crown" as a generic name for full zirconia
23 crowns.

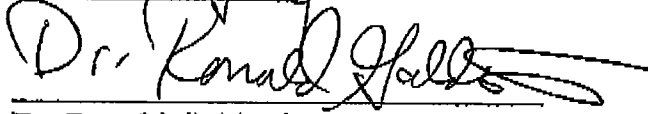
24 23. Paragraphs 54-68 of my declaration submitted in support of
25 Glidewell's Motions for Summary Judgment also support my opinion that Dr.
26 Eggleston's opinions in the expert reports attached to his declaration are unfounded.
27 [Dkt#90-1].
28

24. I have reviewed items 50 and 51 of Keating's Statement Of Uncontroverted Facts And Conclusions of Law In Support of Motion For Summary Judgment of Noninfringement of Glidewell's Bruxzir® Trademark, and Keating's Exhibits 24, 27-29, 31, 34, 37, 39, 42, 43, 93, 94, 96, 99-103, 105, 106, 108-114, 119-137, as well as the declaration of Carol Frattura and the attached Exhibit A. After reviewing these documents, it is my opinion that this evidence fails to suggest any impairment of the commercial strength of the BruxZir mark. I see no evidence that would inform me as to the commercial impact of any of the marks, names or statements contained in these exhibits, which might include evidence such as how the marks are promoted in the marketplace, the amount of advertising done for goods sold under the marks, the dental industry journals in which such advertising is done, any awards or other industry recognition for these products, any information concerning channels of marketing other than the Internet that these companies use, or evidence regarding how long products have been promoted under the marks. In the absence of such evidence, it is impossible to conclude that these marks have had any impact at all on the strength of Glidewell's BruxZir mark. In addition, many of these marks, names or statements (for some of them, such as "All Zirconia for Bruxers," it is not even clear that the referenced terms are even used to refer to a source of goods), are sufficiently distinct phonetically and by sight from the BruxZir mark that they cannot be said to impinge on the market "space" of the mark, at least for a reasonably prudent dentist ordering a crown or bridge. It is also notable that many of these products, particularly those identified in Keating's SUF 50, do not appear to be closely related, if related at all, to dental crowns and bridges. From my experience in the dental industry and as a consumer of numerous types of products marketed and sold to dentists, it is my opinion that none of these products materially impair the commercial strength of the BruxZir mark, in part because none of them has established a commercial presence in the dental

1 community that even approaches the dominance of the BruxZir mark for dental
2 restoration products.

3 25. Since I signed my last declaration in this case, on November 19, 2012,
4 I have reviewed the declaration of Nicole Fallon and Exhibit __ submitted by
5 Glidewell in support of its summary judgment motions filed on November 19. I
6 have also reviewed Exhibit __ attached thereto, and Exhibit __ submitted with
7 Keating's summary judgment motions, comprising materials showing more than 80
8 instances of customers ordering product from Keating using particular terminology,
9 such as by prescription forms and as reflected in Keating contact reports. In my
10 opinion as a practicing dentist for almost 55 years, the contents of these prescription
11 forms and contact reports reflect instances of actual confusion, either because the
12 dentists were confused as to the source of the products they were ordering, or
13 because they were initially confused by Keating's branding and later knowingly
14 ordered product from Keating after having been induced to give Keating's product
15 consideration by the confusion engendered by Keating's branding. My opinion is
16 also based on the specific term (or variant thereof) written by the dentists ordering
17 the product, which I do not disclose herein in order to avoid any confidentially
18 concerns regarding this declaration but which I have reviewed. My opinion is also
19 based on the statements of Dr. Le, as reflected in the Fallon Declaration.
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1 I declare under the penalty of perjury under the laws of the United States of
2 America that the foregoing is true and correct, and that this declaration was
3 executed on November 26, 2012, at New York, New York.

4 
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6 Dr. Ronald Goldstein

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Snell & Wilmer

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Exhibit Y

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7 Attorneys for Plaintiff
James R. Glidewell Dental Ceramics, Inc.
d/b/a Glidewell Laboratories
8

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11 SOUTHERN DIVISION

12 JAMES R. GLIDEWELL DENTAL
CERAMICS, INC.,

13 Plaintiff,

14 vs.

15 KEATING DENTAL ARTS, INC.,

16 Defendant.

17 AND RELATED
18 COUNTERCLAIMS.

Case No. SACV11-01309-DOC(ANx)

**DECLARATION OF DEBORAH S.
MALLGRAVE IN SUPPORT OF
JAMES R. GLIDEWELL DENTAL
CERAMICS, INC.'S OPPOSITIONS
TO KEATING'S MOTIONS FOR
SUMMARY JUDGMENT**

Hearing

Date: December 17, 2012
Time: 8:30 a.m.
Cttrm: 9D, Hon. David O. Carter

Pre-Trial Conf.: January 28, 2013
Jury Trial: February 26, 2013

Snell & Wilmer

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1 I, Deborah S. Mallgrave, declare as follows:

2 1. I am counsel with the law firm of Snell & Wilmer L.L.P., attorneys of
3 record for plaintiff in this action. I am one of the attorneys working on this matter.
4 Except where noted otherwise, I state the following of my own knowledge and, if
5 called upon to do so, would and could testify competently to the following.

6 2. On November 26, 2012, I visited the web page located at
7 <http://www.toschlaboratoryinc.com/LunaZirconiaCrowns.html>. Attached to the
8 Supplemental Appendix Of Evidence In Support Of James R. Glidewell Dental
9 Ceramics, Inc.'s Oppositions To Keating's Motions For Summary Judgment
10 ("Suppl. Appendix of Evidence") as Exhibit 98 is a true and correct copy of that
11 web page as of November 26, 2012.

12 3. On November 26, 2012, I visited the web page located at
13 <http://biocaddental.ca/services/solid-zirconia>. Attached to the Suppl. Appendix of
14 Evidence as Exhibit 99 is a true and correct copy of that web page as of
15 November 26, 2012.

16 4. On November 26, 2012, I visited the web page located at
17 http://www.origincadcam.com/products_ORIGIN-zirconia.html. Attached to the
18 Suppl. Appendix of Evidence as Exhibit 100 is a true and correct copy of that web
19 page as of November 26, 2012.

20 5. On November 26, 2012, I visited the web page located at
21 [http://solutions.3m.com/wps/portal/3M/en_US/3M-ESPE-NA/dental-](http://solutions.3m.com/wps/portal/3M/en_US/3M-ESPE-NA/dental-professionals/products/category/digital-materials/lava-zirconia/)
22 [professionals/products/category/digital-materials/lava-zirconia/](http://solutions.3m.com/wps/portal/3M/en_US/3M-ESPE-NA/dental-professionals/products/category/digital-materials/lava-zirconia/). Attached to the
23 Suppl. Appendix of Evidence as Exhibit 101 is a true and correct copy of that web
24 page as of November 26, 2012.

25 6. On November 26, 2012, I visited the web page located at
26 <http://dpsdental.com/Nautilus.html>. Attached to the Suppl. Appendix of Evidence
27 as Exhibit 102 is a true and correct copy of that web page as of November 26, 2012.
28

1 7. On November 26, 2012, I visited the web page located at
2 <http://www.5axisdental.com/full-zirconia-crowns/>. Attached to the Suppl.
3 Appendix of Evidence as Exhibit 103 is a true and correct copy of that web page as
4 of November 26, 2012.

5 8. On November 26, 2012, I visited the web page located at
6 <http://www.bayshoredentalstudio.com/zirconia-crown.asp>. Attached to the Suppl.
7 Appendix of Evidence as Exhibit 104 is a true and correct copy of that web page as
8 of November 26, 2012.

9 9. On November 26, 2012, I visited the web page located at
10 <http://www.adt-us.com/adt-fz--full-zirconia.html>. Attached to the Suppl. Appendix
11 of Evidence as Exhibit 105 is a true and correct copy of that web page as of
12 November 26, 2012.

13 10. On November 26, 2012, I visited the web page located at
14 <http://www.adt-us.com/adt-fz--full-zirconia.html>. Attached to the Suppl. Appendix
15 of Evidence as Exhibit 106 is a true and correct copy of that web page as of
16 November 26, 2012.

17 11. On November 26, 2012, I visited the web page located at
18 http://www.nusmilecrowns.com/new_ZR.aspx. Attached to the Suppl. Appendix of
19 Evidence as Exhibit 107 is a true and correct copy of that web page as of
20 November 26, 2012.

21 12. On November 26, 2012, I visited the web page located at
22 <http://crowndental.biz/home.html>. Attached to the Suppl. Appendix of Evidence as
23 Exhibit 108 are true and correct copies of the home page and the "Crown and
24 Bridge" page from the website as of November 26, 2012.

25 13. On November 26, 2012, I visited the web page located at [http://cap-](http://cap-us.com/materials/details/28)
26 [us.com/materials/details/28](http://cap-us.com/materials/details/28). Attached to the Suppl. Appendix of Evidence as
27 Exhibit 109 is a true and correct copy of that web page as of November 26, 2012.
28

14. On November 26, 2012, I visited the web page located at http://roedentallab.com/products_TLZ.asp. Attached to the Suppl. Appendix of Evidence as Exhibit 110 is a true and correct copy of that web page as of November 26, 2012.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 26, 2012, in Costa Mesa, California.

Deborah S. Mallgrave
Deborah S. Mallgrave